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IN THE

Supreme Court Of The United States

October Term, 1991

ALASKA AIRLINES, INC. and
TRANSTAR AIRLINES CORPORATION,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AMERICAN AIRLINES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAXWELL M. BLECHER
Counsel of Record

BLECHER & COLLINS
611 West Sixth Street
Twenty-Eighth Floor
Los Angeles, California 90017
(213) 622-4222

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Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in (a) creating a square conflict with decisions in other Circuits by failing to follow this Court's interpretation of Section 2 of the Sherman Act in *United States v. Griffith*, 334 U.S. 100 (1948), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), which provide for liability when monopoly power in one market is used to produce an anticompetitive effect, although falling short of actual or attempted monopolization, in a second, vertically related market, and (b) thus erroneously upholding summary judgment against petitioners' claims of violation of the "essential facilities" and "monopoly leveraging" doctrines under Section 2 of the Sherman Act.

PARTIES TO THE PROCEEDING

All parties to this proceeding are shown in the caption of the case. Petitioner Alaska Airlines, Inc., an Alaska corporation, is wholly owned by Alaska Air Group, Inc., a Delaware corporation. Petitioner TranStar Airlines Corporation, a Texas corporation, which is wholly owned by Southwest Airlines Co., a Texas corporation, is a successor to Muse Air Corporation, which was a plaintiff in the action below. Petitioner Northwest Airlines, Inc., a Minnesota corporation, is wholly owned by NWA, Inc., a Delaware corporation. None of petitioners has a subsidiary other than a wholly owned subsidiary. Midway Airlines, Inc., a Delaware corporation currently in Chapter 7 bankruptcy, and a plaintiff in the action below, has elected not to join this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALASKA AIRLINES, INC., TRANSTAR AIRLINES CORPORATION, and NORTHWEST AIRLINES, INC. respectfully petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-24a) is reported at 948 F.2d 536. The opinion of the United States District Court for the Central District of California (App. 25a-78a) is reported at 694 F. Supp. 1443.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, is set forth at App. 79a and 14 C.F.R. § 255 is set forth at App. 79a-85a.

STATEMENT OF THE CASE

This case concerns the question whether a monopolist should be permitted to abuse its power to the detriment of competition and consumers so long as the monopolist's pernicious conduct causes a significant anticompetitive effect in a second, related but not yet monopolized, market. The decisions of the courts below, rendered as a matter of law on motion for summary judgment—and based on improper judicial factfinding—accord monopolists just such a license. We respectfully submit that the decision of the Court of Appeals below, which squarely conflicts with the settled rules adopted by other Circuits and with the decisions of this Court, and which creates a safe harbor for conduct that is anticompetitive and harmful to consumers, should be reviewed and reversed.

1. *Material Facts.* Respondents American Airlines, Inc. ("American"), and United Air Lines, Inc. ("United"), own air

passenger computer reservation systems ("CRSs"), named SABRE and Apollo respectively. (App. 2a)[1]

A CRS is a computer system that provides travel agencies with access to information on the availability and prices of seats on airline flights, and provides a medium for booking seats and issuing tickets on those flights. A travel agency subscribing to a CRS leases computer terminals and printers from the CRS vendor that are connected to the CRS vendor's computer system, thereby giving the travel agency access to a database of information on all "participating" airlines. There are currently four CRSs operating in the United States, of which SABRE and Apollo are the largest. (App. 26a-27a)

CRSs were first introduced in the late 1970's. After attempts to create an industry-wide CRS failed, following United's withdrawal from the last such venture, American and United introduced SABRE and Apollo. Respondents encouraged use of their CRSs by persuading all major airlines to participate in them—initially free or with minimal charge—and by offering their CRSs to travel agencies at low—below cost—subscription rates. (App. 28a, 55a)[2] The proliferation of flights and fares that followed deregulation of airlines in 1978 rendered it difficult for travel agencies to provide efficient service to their customers without CRSs. (App. 2a-3a) About 95% of all travel agencies, which account for approximately 80% of all domestic airline ticket sales, are automated with a CRS. *See* United States Department of Transportation: Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 7, 21, 44 (1990) [hereinafter Secretary's

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1 In 1988, United sold Apollo to Covia Partnership; United owns approximately 50% of Covia and manages the Apollo CRS for Covia.

2 Once, however, American and United achieved market power by placing their CRSs in approximately 40% and 30%, respectively, of travel agencies, accounting for about half of the tickets written for airline passengers nationwide, American and United were able to—and did—charge substantial and discriminatory booking fees to the various participating airlines. (App. 28a, 43a)

Task Force]. In 1984, SABRE had approximately 40% of all CRS installations in United States travel agencies; Apollo had approximately 30%. (App. 49a n.11)

Few travel agencies subscribe to more than one CRS; from the travel agency's perspective, there is no need to do so because all CRSs provide information about all major airlines. *See* Secretary's Task Force, at 44. Moreover, the contracts that American and United impose on travel agencies substantially and deliberately inhibited them from changing CRSs or adding a second CRS. The SABRE and Apollo subscriber contracts have long contained terms that are designed and have operated to discourage or prevent travel agencies from switching from one CRS to another and from installing more than one system. (App. 32a-33a)[3]

If an airline withdrew from SABRE, that airline would be almost entirely foreclosed from selling tickets on its flights through the approximately 40% of travel agencies that are automated with SABRE. Likewise, if an airline withdrew from Apollo, the airline would be effectively foreclosed from selling tickets on its flights through the approximately 30% of travel agencies automated with Apollo. (App. 49a n.11) Petitioners, whose business is characterized by very high fixed costs, could not possibly afford to incur the immediate reduction in sales and revenue that would ensue if they withdrew from either SABRE or Apollo, much less both systems. SABRE and Apollo, therefore, are firmly entrenched as essential elements in each airline's ability to sell its air transportation services to passengers—indeed, they are each essential to petitioners' very survival.

From the inception of CRSs, American and United used their systems to provide themselves with commercial advantages in the market for air transportation services. Notably, American and United "biased" the screen displays on their CRSs to favor

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3 The contracts were (and still are) for long terms (five years or more), and provide for automatic renewal whenever new equipment is installed and for draconian liquidated damages in the event of withdrawal from SABRE or Apollo.

their own flights over those of their competitors. American and United elevated their respective flights to positions of greatest prominence on the CRS displays that they transmitted to travel agencies using SABRE and Apollo. This practice diverted sales to American and United from other airlines. (App. 27a)

In the early 1980's, Congress and federal regulators became concerned about possible anticompetitive uses of CRSs. In 1984, after a series of reports and Congressional hearings, the Civil Aeronautics Board promulgated rules governing the use of CRSs operated by airlines, including rules prohibiting display bias and discrimination in the fees charged to different carriers. *See* 14 C.F.R. § 255. The CRS rules were upheld by the United States Court of Appeals for the Seventh Circuit when United challenged their validity. *See United Air Lines, Inc. v. Civil Aeronautics Board*, 766 F.2d 1107 (7th Cir. 1985).

Immediately after the federal CRS rules outlawing display bias and price discrimination were promulgated in 1984, United and American increased the fees they charged to certain airlines by over 500%. Despite this enormous increase in the booking fees charged by CRS vendors, not a single airline withdrew from any CRS. (App. 28a, 43a)

In 1985, the present actions were commenced against American and United. The cases were consolidated before the United States District Court for the Central District of California, which had jurisdiction under 15 U.S.C. § 2 and 28 U.S.C. § 1331.

Petitioners asserted a number of claims under Section 2 of the Sherman Act, including claims that SABRE and Apollo were each "essential facilities" for the provision of air transportation services and that American and United, through display bias and discriminatory and excessive prices, had denied petitioners reasonable access to those facilities. Further, petitioners claimed that American and United had monopoly power in the markets for the sale of SABRE and Apollo services, respectively, to airlines, and had "leveraged" that power in order to impair competition in the market for air transportation services. (App. 26a, 70a)

2. *The Decisions Below*. Respondents moved for summary judgment on petitioners' essential facilities and monopoly leveraging claims, among others. The District Court granted summary judgment against petitioners on both claims. First, despite the summary judgment context, the District Court held that neither SABRE nor Apollo was an essential facility. (App. 35a-36a, 38a) Although the District Court found that "American [and United] may be able to extract supracompetitive booking fees in the CRS market, and such price increases do create entry barriers in the air transportation market by raising competitors' costs", the District Court held that there was no danger of monopolization of that market and thus no Section 2 offense. (App. 36a) The District Court made a factual finding on motion for summary judgment and impermissibly discounted petitioners' evidence to the contrary when it held, purportedly as a matter of law, that there were constraints on American's and United's "ability to weaken competition". (App. 38a-39a) Having made this finding, the District Court then focused on market share in the air transportation industry to hold that a reasonable jury was precluded from finding monopolization. (App. 39a)

Second, the District Court flatly rejected the monopoly leveraging doctrine, holding that "it does not appear that the monopoly leveraging theory is consistent with the requirements of Section 2 of the Sherman Act", and granted summary judgment to respondents. (App. 70a)

The United States Court of Appeals for the Ninth Circuit, having jurisdiction under 28 U.S.C. § 1291, affirmed. Relying on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (which held that a wholly owned subsidiary could not conspire with its parent for the purposes of Section 1), the Court of Appeals held that one of two standards of liability—a higher standard for unilateral action cases and a lower standard for concerted action cases—applied to all antitrust claims, including claims under the essential facilities doctrine. (App. 7a-8a) The Court of Appeals so held even though *Copperweld* did not address the essential facilities doctrine and even though no court had ever

before applied such a distinction in the context of the essential facilities doctrine.

The Court of Appeals then held that the standard of liability for *all* unilateral action cases was whether competition, measured by market share, was being eliminated. The Court of Appeals held: "A facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to *eliminate* competition in the downstream market." (App. 15a) (emphasis in original). The Court of Appeals further declared that "[t]he power to eliminate competition must not be momentary, but must be at least relatively permanent." (App. 15a n.11) (citations omitted)

The Court of Appeals found that neither SABRE nor Apollo were essential facilities under this test. According to the Court of Appeals: "Basic economic theory tells us that plaintiffs will withdraw from SABRE or Apollo if the cost of using either CRS causes the cost to the airline of providing a flight booked on a CRS to exceed the revenue that the airline gains by providing the flight." (App. 15a) The Court of Appeals pointed out that "[n]either United nor American have ever set this fee at a level that would drive their competitors away." (App. 16a) The Court of Appeals then held as a matter of fact—despite a complete absence of factual support in the record and despite petitioners' entitlement, on motion for summary judgment, to have all inferences drawn in their favor—that "it is unlikely that defendants would set their fee at such a level, for, if they did, they would destroy their CRSs rather than competition." (App. 16a)

Having decided that there was no "essential facility" in this case, the Court of Appeals proceeded to establish a new test for liability, different from that which prevails in other Circuits. According to the Court of Appeals, even if SABRE or Apollo were an essential facility, the only use of such a facility that would give rise to liability would be actual or attempted monopolization: a firm must *exclude* "at least some of its competitors" from the downstream market. (App. 17a)

Turning to the monopoly leveraging claim, the Court of Appeals flatly rejected the law in other Circuits, including the Second Circuit's decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), stating: "We now reject *Berkey's* monopoly leveraging doctrine as an independent theory of liability under Section 2." (App. 19a) According to the Court of Appeals, using monopoly power in one market in order to gain a competitive advantage in a second market, however harmful to competition and consumers, is "just one of a number of ways that a monopolist can permissibly benefit from its position", provided there is no actual or attempted monopolization. (App. 22a-23a) Thus, under the rule adopted by the Court of Appeals, a monopolist may lawfully leverage its monopoly power to extract virtually unlimited competitive advantages in a second market, so long as evidence of market share and the existence of other firms in the second market insulate it from a finding of actual or attempted monopolization of that market.

The Court of Appeals concluded that "the antitrust laws seek to punish only the willful attainment and maintenance of a monopoly, or the attempt to attain such a monopoly." (App. 23a-24a) Thus, the Court of Appeals held that standard monopolization and attempted monopolization doctrine occupied the entire field and rejected any separate monopoly leveraging doctrine.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Creates a Conflict in the Circuits With Respect to the Monopoly Leveraging Doctrine That This Court Should Resolve.* The Court of Appeals could not have been more explicit in creating a conflict in the Circuits than by its express rejection of the Second Circuit's decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The Ninth Circuit's holding that the use of monopoly power in one market to gain a competitive advantage in another only gives rise to liability if there is monopolization or attempted monopolization of the second

market—measured by market share and the existence of other firms—is flatly contradictory to *Berkey* and those cases following it.

In *Berkey*, the Second Circuit held that "a firm violates § 2 by using its monopoly power in one market to gain a *competitive advantage* in another, albeit without an attempt to monopolize the second market". *Id.* at 275 (emphasis added). The *Berkey* court further held:

> "We tolerate the existence of monopoly power . . . only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable." *Id.*

The Second Circuit reaffirmed *Berkey* in *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (1985):

> "A successful claim of monopoly leveraging requires proof of at least three factors: monopoly power in one market, '"the use of [that] power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage*, or to destroy a competitor"' in another distinct market, and injury caused by the challenged conduct." (Citations omitted) (emphasis added).

The decision of the Ninth Circuit is also at odds with the holding of the Sixth Circuit in *Kerasotes Mich. Theatres v. National Amusements*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989). Following *Berkey*, the *Kerasotes* court expressly rejected the requirement that the monopolist use its power either to monopolize or attempt to monopolize the second market. The court held that "[t]o run afoul of the antitrust laws, it is not necessary that the party attempting to leverage its monopoly power from a given market into a second

market possess monopoly power or dominant market position in that second market". *Id.* at 137. The court found that the sole purpose of the conduct at issue was "to extend a business' dominance from one market into a second market, without having to achieve that dominance in the second market by developing a superior product or as the result of other legitimate competitive advantages" and that it was, therefore, unlawful. *Id.*

The Ninth Circuit's rejection of petitioners' monopoly leveraging claims creates a clear conflict in the Circuits, which this Court should resolve.[4]

2. *The Decision Below Creates a Conflict in the Circuits With Respect to the Essential Facilities Doctrine That This Court Should Resolve.* The Ninth Circuit's decision is also in clear conflict with the decisions of other Circuits with respect to the essential facilities doctrine. The Court of Appeals below held that a facility is not "essential" unless it can be used to "eliminate" competition in the downstream market. (App. 15a) Moreover, the Court of Appeals held that the essential facility must be used actually to monopolize or attempt to monopolize. (App. 17a) Other Circuits, however, have adopted less stringent tests, both regarding what constitutes an essential facility and regarding what constitutes forbidden anticompetitive behavior.

In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the D.C. Circuit held: "To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants." (Footnote omitted). The D.C. Circuit's

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4 Both the Fourth Circuit and the D.C. Circuit have expressly reserved judgment on whether or not "monopoly leveraging" states a distinct antitrust violation under Section 2. *See Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 149 n.17 (4th Cir. 1990); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984). *See also Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1567-68 (11th Cir. 1990) (not reaching question of whether monopoly leveraging short of attempted monopolization violated Section 2 of Sherman Act).

Hecht standard, requiring far less of a showing for liability than the Ninth Circuit now requires, has been followed by several other Circuits.

Both the Sixth and Seventh Circuits have agreed with the D.C. Circuit that to be essential a facility need not be "indispensable" but rather so important and difficult to duplicate, that competition is impaired. *See Directory Sales Mgt. Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 612 (6th Cir. 1987) (quoting *Hecht*); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (same).[5]

The *Directory Sales* and *Fishman* cases also adopt *Hecht*'s "severe handicap" standard with regard to the anticompetitive effect that must be shown. *See Directory Sales*, 833 F.2d at 612; *Fishman*, 807 F.2d at 539. The Second Circuit adopted the same standard in *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990), holding that "[a] successful 'essential facilities' plaintiff must prove that denial of access has caused it 'severe handicap.'" As the Second Circuit pointed out, the policy behind the essential facilities doctrine "is to prevent a monopolist in a given market . . . from using its power to *inhibit* competition in another market", not to prevent a monopolist from foreclosing competition in the second market. *Id.* at 568 (emphasis added).[6]

Shortly after the *Twin Laboratories* decision, the Second Circuit again considered the essential facilities doctrine, in

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5 Similarly, in *City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989), the Eighth Circuit implicitly rejected the elimination of competition standard. The court approved the following jury instruction as appropriate in essential facility cases: "Monopoly power, that is, the power to control prices or the power to exclude *or economically inhibit* competitors, may be proven through what is known as a bottleneck monopoly." *Id.* at 163 n.6 (emphasis added).

6 The Court of Appeals in the present case purported to rely on the *Twin Laboratories* decision. (App. 13a-14a) The Court of Appeals acknowledged that *Twin Laboratories* turned on a "severe handicap" standard, but it still proceeded, without explanation, to propound an elimination of competition standard directly at odds with *Twin Laboratories*. (App. 14a-15a)

Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991), and expressly distinguished it from the separate offenses of monopolization and attempted monopolization. Having dealt with plaintiff's claim of monopolization the Court of Appeals continued, "[w]e turn next to the question whether the make or buy policy constituted denial of an essential facility and, by implication, a violation of § 2". *Id.* at 179. Only after having separately addressed the essential facilities claim did the Court of Appeals turn to the attempted monopolization claim.

In its discussion of the essential facilities doctrine in *Delaware & Hudson*, the Second Circuit made no mention of foreclosing or attempting to foreclose competition. Rather, the Court of Appeals held that the essential facility owner must, to the extent possible, treat its competitors on an equal basis with itself, in order not to impair competition. "[T]here need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable." *Id.* at 179-80. Further, the essential facility owner has to "'place every such [user] company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary [owner] companies.'" *Id.* at 180 (quoting *United States v. Terminal Railroad Assoc.*, 224 U.S. 383, 411 (1912)).

Plainly, the Ninth Circuit's application of traditional monopolization and attempted monopolization standards to essential facilities claims is flatly at odds with the prior decisions of the Second, Sixth, Seventh and D.C. Circuits—a second conflict in the Circuits that this Court should resolve.

3. *The Decision Below Conflicts With the Settled Antitrust Precedent of This Court.* Both the essential facilities and monopoly leveraging doctrines address a single issue: to what extent may a monopolist lawfully use its monopoly power in one market to gain a competitive advantage in another market? The essential facilities doctrine is merely an instance of that overall question. The Ninth Circuit's response is that, at least in the context of a single firm monopolist, only actual or attempted

monopolization of the second market—which requires substantial market share—is unlawful.[7] Moreover, in the context of essential facilities, no monopolization or attempted monopolization claim will lie unless it is first established that the monopolist has the ability to *eliminate* competition in the *second* market. These novel standards ignore and distort the governing decisions of this Court.

In *United States v. Griffith*, 334 U.S. 100, 107 (1948), this Court held that: "the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage*, or to destroy a competitor, is unlawful." (Emphasis added). In *Griffith*, theatre owners that held monopoly power in certain towns were using that power to gain competitive advantages in other towns, in which they had competitors. This Court held that monopolists could not avoid liability merely by showing that "no competitors were driven out of business". *Id.* at 109. Thus, the Court overturned the District Court's ruling that there was no monopolization or attempted monopolization and remanded the case.

The Court of Appeals below attempted to distinguish the *Griffith* standard, stating "it is not controlling since it is a Section 1 case involving concerted action". (App. 19a n.16) That distinction is unavailing. The paragraph quoted above is explicitly addressed to—and indeed, confined to—Section 2. Moreover, this Court expressly held, in *Griffith*, that, in the circumstances, it did not matter whether the challenged conduct was that of a single firm or concerted action:

> "The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor

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7 Under that test, the existence of competitors—evidenced by the fact that, at the time of the District Court's opinion, American and United each had only 12-14% shares of the market for air transportation services—was dispositive for the District Court and Court of Appeals in granting summary judgment against petitioners.

> or whether two or more exhibitors lump together their buying power, as appellees did here. It is *in either case* a misuse of monopoly power under the Sherman Act." 334 U.S. at 108 (emphasis added).

Griffith is the foundation of the monopoly leveraging doctrine. *Berkey* was expressly based on the passage from *Griffith* quoted above. *See Berkey*, 603 F.2d at 275. To ignore *Berkey* is to ignore *Griffith*, and that the Ninth Circuit may not do.

Griffith is also the antecedent of *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), which the Court of Appeals below recognized as the leading and controlling case with regard to the essential facilities doctrine in the single firm context. (App. 11a) In *Otter Tail*, defendant had monopoly power over the "wholesale" distribution of electric power within a certain area, and used that power to restrict competition in the market for the "retail" distribution of electric power in that area. This Court held: "The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition *or gain a competitive advantage*, or to destroy a competitor, all in violation of the antitrust laws." *Id.* at 377 (citing *Griffith*, 334 U.S. at 107) (emphasis added).

The Court of Appeals below ignored this language and distinguished *Otter Tail* as a case in which there was actual and attempted monopolization. That reasoning is circular. There was indeed a finding of actual and attempted monopolization in *Otter Tail*, but plainly on a *different standard* from that espoused by the Court of Appeals in this case. The proper standard to be applied in essential facilities cases is the *Griffith* standard, as *Otter Tail* made clear.

Moreover, the Court of Appeals below required that the essential facility owner possess the power to *eliminate* competition, in square conflict with *Otter Tail*. Otter Tail did *not* have the power to *eliminate* competition. Rather, "[i]ts control over transmission facilities in much of its service area gives it *substantial effective control* over potential competition from municipal ownership." *United States v. Otter Tail Power Co.*, 331 F. Supp.

54, 61 (D. Minn. 1971) (emphasis added).[8] This Court expressly acknowledged that Otter Tail's inability to eliminate competition was irrelevant, noting that "[t]he fact that three municipalities which Otter Tail opposed finally got their municipal systems does not excuse Otter Tail's conduct." 410 U.S. at 381. The misinterpretation and rejection of *Otter Tail's* clear language by the Court of Appeals below is reversible error.

The heart of the decision below is a fundamental misunderstanding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* did not define monopolization, but merely pointed out that monopolization is a higher standard than unreasonable restraint of trade and that monopolization is the proper standard to apply to cases involving unilateral action. *Copperweld* did not immunize actions by a firm with monopoly power in one market that have anticompetitive effects in a second market merely because that firm's actions are effectively unilateral and do not actually eliminate competition in the second market. Rather, *Copperweld* requires only that where the challenged actions are properly regarded as the conduct of a single firm—whether a parent and subsidiary acting together, an essential facility owner or a monopolist trying to leverage its market power from one market into another market—the legality of that conduct must be analyzed under the Section 2 monopolization standards appropriate to the circumstances.

Here, the conduct at issue is unilateral action by the CRS owner that has effects in two markets: the market for providing CRS services, in which the CRS owner has monopoly power, and the air passenger transportation market, in which it does not. In such a case, the applicable monopolization standards are those set forth in *Griffith* and *Otter Tail*. The interpretation of *Copperweld* suggested by the court below would not merely rewrite *Griffith* and *Otter Tail*; it would hold that *Copperweld* overruled both

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8 This factual finding was relied upon by the D.C. Circuit in *Hecht* for its determination that to be "essential" a facility need not be "indispensable". *See Hecht*, 570 F.2d at 992 n.40.

those decisions *sub silentio*. There is no basis for that conclusion.[9]

4. *The Decision Below Improperly Affirmed Summary Judgment by Resolving Fact Issues on the Basis of Economic Theory.* The Court of Appeals below disguised the ultimate consequences of its decision—the creation of an immunity for otherwise illegal anticompetitive conduct in the airline industry—by making impermissible and unwarranted factual findings that discount, or disregard entirely, the anticompetitive effects of American's and United's behavior. Those assumptions not only improperly attempted to validate the unsupportable consequences of the decision below, but also deprived petitioners of their right to trial and an opportunity to prove the harm of which they complain. Each of these crucial findings of fact is either unsupported by the record or is the subject of a genuine dispute.

a. *The Decision Below Impermissibly Overlooked American's and United's Power to Eliminate Competition Through a Price Squeeze.* The Court of Appeals "found" that "defendants' control of their CRSs did not give them power to eliminate competition in the downstream air transportation market." (App. 15a) The District Court, however, found that American and United "may be able to extract supracompetitive booking fees in the CRS market, and such price increases do create entry barriers in the air transportation market by raising competitors' costs". (App. 36a) Moreover, the Court of Appeals

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9 Further, if the Court of Appeals is correct, *Copperweld* also overruled forty years of established tying law *sub silentio*. An illegal tying arrangement, challenged under Section 1, is simply the unilateral exercise of market power in the tying product market to impair competition in the tied product market—in which the seller lacks market power. According to the decision below, *Copperweld* dictates that such an arrangement can only be illegal if competition is eliminated. Thus, the Ninth Circuit held that *Copperweld* overruled *sub silentio* such seminal tying cases as *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953), and *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958), as well as *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), decided only one month before *Copperweld*. No such revolution in the law governing tying arrangements can be inferred from *Copperweld*.

suggested that American and United could increase competitors' costs, using their CRSs, as far as they chose and not cause competitors to withdraw from those CRSs, provided that the cost of "providing a flight booked on a CRS" did not "exceed the revenue that the airline gains by providing the flight". (App. 15a) If that is true, then American and United can effect a "price squeeze" and *can* eliminate competition in the air transportation market.[10] There is no basis for the Court of Appeals' finding that they cannot.

b. *The Decision Below Impermissibly Assumed That an Airline Can Withdraw From a CRS.* The Court of Appeals simply and crucially assumed—as a matter of "[b]asic economic theory" (App. 15a)—that an airline could withdraw from a CRS and still survive commercially; if American or United prompted such a withdrawal, "they would destroy their CRSs rather than their competition." (App. 16a) There is no basis whatsoever for that assumption. It is contradicted by the undisputed fact that, despite respondents' massive increases in booking fees charged to airlines, no airline has withdrawn from any CRS. Moreover, petitioners' evidence at trial would have shown—contrary to the Court of Appeals' assumption—that withdrawal from either SABRE or Apollo would swiftly have destroyed any airline that tried it.

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10 By raising competitors' costs—in a manner unrestrained by market forces—respondents can control, limit and ultimately, if they wish, destroy their competitors' ability to offer either price or service competition in the downstream market for air transportation services. The illegality of such "price squeezing" was made plain in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945) (L. Hand, J.). Alcoa had monopoly power in the market for aluminum ingot, and was also a manufacturer of aluminum sheet, which was made from that ingot. Alcoa used its monopoly power to keep the price of ingot sufficiently high and the price of sheet sufficiently low to deprive its competitors in the sheet market of "a living profit". *Id.* at 437. Slowly, Alcoa's competitors were being driven out of business. Although Judge Hand recognized that Alcoa's conduct "was not part of an attempt to monopolize the 'sheet' market", he still held that it was an actionable abuse of monopoly power in the ingot market: "That it is unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable." *Id.* at 438.

c. *The Decision Below Impermissibly Assumed That a Travel Agency Can Change Its CRS.* The finding of the Court of Appeals that SABRE and Apollo were not "essential" rests heavily on the theory that if an airline is unhappy with booking fees charged by a CRS vendor, the airline can withdraw from the CRS, and that travel agencies will not subscribe to the CRS if it does not contain information about *all* the vendor's competitors.[11] This theory in turn depends on the premise that "*aside from contractual limitations*, travel agents can switch CRSs whenever they desire". (App. 16a n.12) (emphasis added). That gargantuan "aside from" calls to mind the apocryphal question posed to Mrs. Lincoln. A central contention of petitioners was that respondents' practices of using long-term contracts and onerous liquidated damage provisions effectively prevented travel agencies from switching CRSs. Petitioners presented substantial evidence in support of that contention. The District Court unabashedly and impermissibly weighed that evidence and found that "[t]he significance of the entry barriers . . . are exaggerated by plaintiffs." (App. 35a) The Court of Appeals not only failed to correct the District Court's usurpation of the role of trier of fact, but repeated it; it too weighed the evidence of "contractual limitations" (App. 15a-16a n.12) and rejected petitioners' contention that this evidence rebutted any presumption that airlines can simply withdraw from a CRS, secure in the knowledge that travel agencies will quickly abandon it. Petitioners showed that there was a genuine issue of material fact, and summary judgment should plainly have been denied.

d. *The Decision Below Impermissibly Relied on Market Share as the Only Possible Indicator of Market Power.* The Court of Appeals repeated the mistake of the District Court in simply assuming that because respondents had shares of the air transportation market no greater than 12-14% (they now have substantially

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11 This assumption by the Court of Appeals involves a sleight-of-hand: even if a CRS would be unmarketable to travel agencies if there were no information on it concerning any of the CRS vendor's competitors, it does not follow that one individual airline can withdraw from a CRS, confident in the belief that the absence of information about *its* flights will make the CRS similarly unmarketable.

increased shares), they could not be causing substantial harm—*i.e.*, they could not be monopolizing or attempting to monopolize the market. (App. 16a) The fact, however, that respondents have the power to increase petitioners' costs to the level of marginal revenue means, despite their seemingly small market shares, that they *can* control or even eliminate competition, and thus *can* cause substantial harm to consumers.

These assumptions of contested material facts in favor of respondents allowed the District Court and the Court of Appeals to make it appear that there would be no harmful consequences to their decisions. That is not the case. Petitioners presented evidence and economic analysis demonstrating the anticompetitive nature of the conduct in question. The courts below did not have the power to discount and reject that evidence and analysis.

In order to avoid summary judgment, petitioners had to demonstrate that there is *some* evidence that would create a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Petitioners came forward with evidence that SABRE and Apollo are the only method of reaching travel agencies that sell about half of all air transportation tickets, that there is no practical alternative to membership in SABRE and Apollo and that American and United were using their ownership of SABRE and Apollo to restrict competition and control the costs of competitors in the air transportation market—indeed, that they had the power to entirely eliminate competition among airlines. That showing, *even under the improperly restrictive standards adopted by the Court of Appeals*, was sufficient to go to a jury.

The courts below, however, weighed petitioners' evidence and decided it was unpersuasive. That is not permissible. Indeed, "'[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). The District Court and the Court of Appeals completely reversed that presumption and denied petitioners their right to trial. For that reason alone, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAXWELL M. BLECHER
Counsel of Record

BLECHER & COLLINS
611 West Sixth Street
Twenty-Eighth Floor
Los Angeles, California 90017
(213) 622-4222

Attorneys for Petitioners

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 90-55162, 90-55163

ALASKA AIRLINES, INC.; MIDWAY AIRLINES;
MUSE AIR CORPORATION,
Plaintiffs-Appellants

v.

UNITED AIR LINES, INC.,
Defendant-Appellee

ALASKA AIRLINES, INC.,
Plaintiff

and

NORTHWEST AIRLINES, INC.,
Plaintiff-Appellant

v.

UNITED AIR LINES, INC.,
Defendant

and

AMERICAN AIRLINES, INC.,
Defendant-Appellee

Argued and Submitted April 5, 1991

Decided October 29, 1991

Before: NORRIS, HALL and TROTT,
Circuit Judges

OPINION OF THE COURT

CYNTHIA HOLCOMB HALL, Circuit Judge.

Alaska Airlines, Muse Air Corporation, Midway Airlines, Inc., and Northwest Airlines, Inc. (collectively "plaintiffs") brought suit against their two largest competitors, United Airlines and American Airlines (collectively "defendants"), alleging that defendants had individually violated the Sherman Act in operating their proprietary computerized reservation systems ("CRS"). Plaintiffs appeal the district court's grant of summary judgment against them on two of their three distinct claims under Section 2 of the Act. 15 U.S.C. § 2. The district court had jurisdiction under 15 U.S.C. § 2 and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I.

In 1974, American Airlines obtained government approval to attempt to persuade the other major airlines to pool their resources and create a jointly-owned CRS. A CRS provides participating travel agents with schedule, fare, and seat availability information for every airline that subscribes to the CRS. Further, a CRS allows travel agents to send and receive airline booking data, book space on flights, and automatically prepare tickets and advance boarding passes. The proposed joint CRS project collapsed in 1976 due to insufficient funding. Three weeks later, United Airlines announced that it would create a proprietary CRS under the trade name of Apollo. American Airlines quickly responded by announcing that it would create its own proprietary CRS, under the trade name of SABRE. Other airlines also quickly developed proprietary CRSs.[1] American's SABRE soon became the largest CRS. United's Apollo was the second largest.

Shortly after SABRE and Apollo began operations, Congress deregulated the airline industry. *See* The Airline

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1 TWA began operating a CRS in 1976. Eastern Airlines and Delta Airlines began operating CRSs in 1981.

Deregulation Act of 1978 ("the Deregulation Act"), Pub.L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. App. § 1301). Deregulation fueled demand for computerized fare and flight availability information, and as a result a substantial percentage of total air passenger bookings were made through CRSs.

The CRS works as follows. The airlines pass flight information to the CRSs, and the CRSs then provide this information to their subscribers, the travel agents. The travel agents in turn use the information to serve consumers, who naturally desire the lowest airfares and the most convenient flights. The CRSs charge travel agents only a nominal fee, or no fee, for the CRSs' services. In contrast, the CRSs charge airlines a substantial amount for such services, in the form of a per booking fee. For example, since the Civil Aeronautics Board ("the Board") ruled in 1984 that each CRS owner must charge its airline customers a uniform rate, American has charged a uniform fee of $1.75 for each booking made through SABRE.[2]

The CRS market's triangular structure makes the market unusually resistant to normal disciplinary mechanisms. A CRS's market share (the proportion of flights that are booked through a given CRS) might ordinarily be thought to depend on both how many travel agents and how many airlines subscribe to the CRS. However, because each and every airline subscribes to each and every viable CRS, the market share of a given CRS depends solely on the number of travel agents who subscribe to that CRS. Airlines generally subscribe to every CRS because the CRSs charge the airline *per booking*. The $1.75 fee to secure a booking is of little consequence because a $300 or $400 fare may otherwise be lost. This is not to say that a CRS can charge its airline subscribers any fee that it desires, no matter how high. Basic economic theory tells us that an airline will withdraw from the CRS if the cost of using it causes the marginal cost of providing a flight booked on the CRS to exceed the marginal revenue gained

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2 The Deregulation Act eliminated both the Board itself and many of its functions. *See* 49 U.S.C. § 1551. Most of the Board's remaining functions were transferred to the Department of Transportation. *See* id. at § 1551(a)(1)(E). The CRS fee regulation remains in effect. *See* 14 C.F.R. § 255.5(a).

by the booking. *See generally* M. Handler, H. Blake, R. Pitotsky, H. Goldschmid, Trade Regulation App. B (2d ed. 1983) (hereinafter "Trade Regulation"). However, since CRS fees are a relatively small part of the total costs incurred by a "booked" airline when it provides air transportation to a paying passenger, the CRSs have leeway to charge substantial booking fees.

The plaintiffs, each previous subscribers to Apollo and SABRE, were unhappy about the ability of their largest competitors to extract substantial booking fees from them. Accordingly, plaintiffs brought suit under the Sherman Act.[3] Plaintiffs argued that United and American had individually violated Section 2 of the Sherman Act by, among other things: (1) denying plaintiffs reasonable access to their CRS services, which were alleged to be "essential facilities;" and (2) "leveraging" their dominance in the CRS market to gain a competitive advantage in the downstream air transportation market. The district court granted summary judgment in favor of defendants on both claims. Plaintiffs have appealed.[4]

II.

The district court's grant of summary judgment is reviewed *de novo*. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). We must decide, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court

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3 At the conclusion of pretrial proceedings in September 1989, two separate CRS cases were ready for trial: (1) a suit by Northwest Airlines against American Airlines, and (2) a suit by Alaska Airlines, Midway Airlines, and Muse Air Corporation (now part of Southwest Airlines) against United Airlines. The district court consolidated these cases and tried both of them simultaneously, a decision that has not been appealed.

4 Plaintiffs also asserted a third Section 2 claim, arguing that each defendant had unlawfully acquired and then exercised monopoly power over travel agents in the market for CRS services. This third claim was tried to a jury, which returned a verdict in favor of each defendant. Plaintiffs do not appeal from these jury verdicts.

correctly applied the relevant law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

III.

A.

Defendants argue that the doctrine of res judicata bars plaintiffs from pursuing their essential facilities and monopoly leveraging claims in this court. "The concept of res judicata embraces two doctrines, claim preclusion and issue preclusion (or collateral estoppel), that bar, respectively, a subsequent action or the subsequent litigation of a particular issue because of the adjudication of a prior action." *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986). Defendants' claim is meritless because this is not a case where plaintiffs, unhappy with the outcome of one action, institute an entirely separate action either alleging grounds for relief which could have been raised in the prior suit upon the same cause of action, or involving an issue previously litigated in the prior action. Rather, plaintiffs are merely appealing the district court's award of summary judgment in favor of defendants on two discreet issues alleged in the complaint. The doctrine of res judicata prohibits repetitive litigation, not appellate review of claims rejected by the district court. *See McClain*, 793 F.2d at 1032-33.

B.

Defendants also contend that plaintiffs are judicially estopped from denying that collateral estoppel bars their essential facilities and monopoly leveraging claims. The doctrine of judicial estoppel precludes a party from arguing inconsistent positions to gain an unfair advantage over its adversary. *See Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990) (state may not argue that appellant is procedurally barred from obtaining relief in state court when it had previously persuaded district court to deny appellate review because appellant had "adequate and available" state remedy), *cert. denied*, — U.S. —, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991); *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir.1988).

Defendants' argument is without merit because plaintiffs' positions are not inconsistent. Prior to trial, defendants argued that plaintiffs did not have standing to assert unlawful monopolization of the market for CRS services to travel agents. In response to defendants' standing argument, plaintiffs asserted that defendants had monopoly power *over travel agents* and that defendants' monopoly power *affected* plaintiffs as consumers in that market.[5] Now, to support their monopoly leveraging and essential facility claims, on which the district prevented trial by granting summary judgment for defendants, plaintiffs say that defendants have monopoly power *over plaintiffs*, and that this factual question has not yet been determined. Plaintiffs' positions are not inconsistent because the argument that defendants had monopoly power over travel agents does not preclude the possibility that they might also have such power over airlines. Nor is it unfair for plaintiffs to press this argument on appeal because plaintiffs clearly made the argument below; this is not a case where a party creates a new theory to sustain its argument on appeal.

IV

We turn to the merits of plaintiffs' antitrust claims. The antitrust laws are designed to "safeguard general competitive conditions, rather than to protect specific competitors." *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 370 (9th Cir.1988).

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5 Defendants contend that, in response to the standing challenge, plaintiffs defined the relevant market as CRS services to both travel agents and airlines. Defendants are incorrect. Plaintiffs argued that the market was identical to the one approved by the district court in its summary judgment opinion, In re Air Passenger Computer Reservations Systems Antitrust Litigation, 694 F.Supp. 1443 (1988). While the court in that opinion does use loose language suggesting that the relevant market consists of CRS services to both travel agents and airlines, in its decision on the standing motion, the district court explained that, in its summary judgment opinion, "[it] undertook to analyze the relevant markets to CRS services to travel agents and found that the plaintiff airlines were consumers in that market for the purpose of establishing a Section 2 monopolization claim." (ER, vol. I, at 440). Thus, even if plaintiffs alleged that the market included services to both airlines and travel agents, it is obvious that the district court did not base its decision on this allegation.

A

The Sherman Act provides in relevant part:

> [Section 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> [Section 2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C. §§ 1, 2.[6]

The bare text of the Sherman Act indicates that Sections 1 and 2 focus on different problems. Section 1 deals with concerted activity, outlawing "combination[s] . . . in restraint of trade." *Id.* Section 2, on the other hand, concerns unilateral activity, punishing "[e]very person who shall monopolize, or attempt to monopolize . . . ." *Id.*

The Supreme Court described the differing functions of Sections 1 and 2 in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).[7] The Court emphasized that the Act distinguishes between unilateral and concerted conduct. While concerted conduct is subject to sanction if it merely restrains trade, unilateral conduct

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6 Private treble damage actions for violations of the Sherman Act are authorized by Sections 4 and 5(a) of the Clayton Act. 15 U.S.C. §§ 15, 16.

7 In *Copperweld* the Court considered the validity of the "intra-enterprise conspiracy" doctrine. The Court faced the question whether a wholly-owned subsidiary corporation and its parent corporation could "conspire" with each other for purposes of Section 1 of the Sherman Act. *Copperweld*, 467 U.S. at 767, 104 S. Ct. at 2739. It is apparent from the *Copperweld* opinion that the Court relied heavily on its analysis of the relationship between sections 1 and 2 of the Act in concluding that a wholly owned subsidiary cannot "conspire" with its parent. *See id.* at 767-69, 774-77, 104 S. Ct. at 2739-41, 2743-45.

is subject to sanction only if it either actually monopolizes or threatens monopolization. The *Copperweld* Court said:

> It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression . . . . [B]ecause it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur . . . .
>
> It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firm acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to §1 liability . . . .
>
> Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.

Id. at 767-69, 774-77, 104 S. Ct. at 2739-41, 2743-45.

The instant case is predicated on Section 2.[8] We review the two traditional grounds for relief under Section 2, monopolization and attempted monopolization, before moving on to consider plaintiffs' less orthodox claims. The traditional claim for monopolization has two elements: "'1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 596 n. 19, 105 S.Ct. 2847, 2854 n. 19, 86 L.Ed.2d 467 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966)). The traditional claim for attempted monopolization arises when the danger of monopolization is clear and present, but before a full-blown monopolization has necessarily been accomplished. Accordingly, the elements of attempted monopolization, like the elements of monopolization, emphasize monopoly power and the acquisition or perpetuation of this power by illegitimate "predatory" practices. A claim for attempted monopolization has three elements: 1) a specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir. 1986); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed. 2d 712 (1984).

B

Plaintiffs claim that United and American individually violated Section 2 of the Sherman Act by denying Plaintiffs reasonable access to Apollo and SABRE. They base their claim

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8 Plaintiffs based their claims against defendants on Section 2 of the Sherman Act in the district court, in their opening brief, and at oral argument. Thus, we do not consider the viability of any claims that plaintiffs might have had under Section 1 of the Act. *See United States v. Munoz*, 746 F.2d 1389, 1390 (9th Cir. 1984) (refusing to consider a tort theory not raised below in a contract action).

on the "essential facilities" doctrine.[9] Stated most generally, the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first. Plaintiffs propose a broad view of the essential facilities doctrine, claiming that defendants are liable under the doctrine even though defendants' control of their respective CRS systems did not give them power to eliminate competition in the downstream air transportation market. We must consider whether the essential facilities doctrine reaches that far.

In support of its broad view of the essential facilities doctrine, plaintiffs mistakenly rely on three Supreme Court cases: *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948) (holding invalid concerted action by a number of movie distribution companies); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (ordering Associated Press, which had created a pooled news service, not to exclude prospective members merely because the prospective members competed with existing members); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 397, 401, 411-12, 32 S.Ct. 507, 510, 512, 516, 56 L.Ed. 810 (1912) (holding that competitors had to be admitted into a combination formed by several railroads that had acquired control of all the passages into and out of St. Louis, passages which were not amenable to duplication). *Griffith*, *Associated Press*, and *Terminal Railroad* are of limited value because each case involved a *combination* in restraint of trade, not single firm conduct. Under the Sherman Act, combinations and individual firms are treated quite differently. *See Copperweld*, 467 U.S. at 767-69, 774-77, 104 S.Ct. at 2739-41, 2743-45 (while a combination may be liable for effecting a mere restraint of trade, for a single firm to be liable there generally must be either

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9 We considered the essential facilities doctrine only very briefly in *Ferguson v. Greater Pocatello Chamber of Commerce Inc.*, 848 F.2d 976, 983 (9th Cir.1988), before concluding it was inapplicable on the facts before us.

monopolization or the threat of monopolization). Moreover, as one commentator has noted:

> [*Associated Press*] cannot automatically govern *unilateral* denial of an essential facility for several reasons. First, and most obvious, concerted action is exceptional, whereas unilateral action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy . . . . Second, concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created . . . . Third, admission to a joint venture is a one-time remedy that does not require [the exertion of] day-to-day control [by the courts].

Areeda, *Essential Facilities: An Epithet In Need of Limiting Principles*, 58 Antitrust L.J. 841, 844-45 (1990) (emphasis added).

A review of the cases in which the doctrine has been applied to facilities controlled by single firms suggests that Section 2 does not prohibit the defendants' unilateral conduct. The sole Supreme Court case involving a single firm's control of an "essential facility" is *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). The Otter Tail Power Company's general practice was to supply both "wholesale" and "retail" electrical services in its operating area. However, a number of municipalities decided that they would prefer to supply the retail component of these electrical services themselves, and sought to contract with Otter Tail Power for only "wholesale" electrical services. Otter Tail Power, whose wholesale, electrical services could not be duplicated feasibly, refused to supply only wholesale electricity, thereby eliminating the possibility of competition in the provision of "retail" electrical services. *Id.* at 369-71, 376-79, 93 S.Ct. at 1025-27, 1028-30.

Otter Tail, the foundation of the essential facilities doctrine in the single firm context, was an extreme case. Otter Tail Power,

an "upstream" monopolist, baldly refused to deal with its potential "downstream" competitors. Given the difficulty of duplicating Otter Tail's facilities, this refusal did more than merely impose some handicap on potential competitors; it eliminated all possibility of competition in the downstream market. As the Supreme Court indicated, Otter Tail Power had both attempted to monopolize and had succeeded in monopolizing the downstream market for "retail" electric services. *Id.* at 377-79, 93 S.Ct. at 1029-30.

Two Seventh Circuit decisions suggest the limits of the essential facilities doctrine in the single firm context. In *MCI Communications Co. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), the court held that AT&T violated Section 2 by refusing to connect MCI to its network. *MCI*, like *Otter Tail*, involved a refusal to grant access to a facility that could not be duplicated feasibly. *Id.* Moreover, this refusal eliminated competition, rather than merely impeding it. Thus, like Otter Tail Power, AT&T had the power to eliminate competition in a downstream market, exercised this power, and thereby monopolized the market.

In sharp contrast to MCI is *Olympia Equip. Leasing v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987). Western Union, which had for years dominated the businesses of providing telex services and leasing telex machines, decided to quit the telex leasing business. Since the firm had a large stock of telex machines that it needed to dispose of, it converted its leasing agents into a sales force. *Id* at 372-73. In an effort to help open the telex machine supply market to competition, Western Union instructed this newly formed sales force to pitch not only Western Union's telex machines, but also the machines of new entrants into the telex machine supply business. However, when the sales of Western Union's own telex machines did notmeet expectations, the firm ordered its salespeople to stop mentioning the products of competing vendors. *Id.* Olympia, one of Western Union's rivals in the Telex machine supply business, brought suit under Section 2. Olympia claimed that Western Union's sales

force was a facility "essential" to participation in the telex machine supply market, and asserted a right to nondiscriminatory access. *Id.* at 376-77.

The Seventh Circuit rejected Olympia's claim, holding that Olympia had no right of access to the trail that Western Union had already blazed. Even though Western Union's sizable sales force provided a considerable advantage and would require great effort to duplicate, Olympia must blaze its own trail to consumers. Judge Posner, for the court, stated: "Olympia had no right under antitrust law to take a free ride on its competitor's sales force. You cannot conscript your competitor's salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant." *Id.* at 377-78.

Moreover, Western Union's sales force was not an "essential" facility because the sales force's withdrawal did not eliminate the potential for competition:

> All Western Union did in this case to "obstruct" Olympia from competing with it in the sale or lease of telex terminal equipment was to stop making referrals to Olympia. That was not [sufficient] obstruction . . ., for Olympia remained free to compete by sending salesmen to call on Western Union's subscribers. This was not an illusory freedom. Firms better established than Olympia—firms that had their own sales forces—weathered the withdrawal of the vendor list.

Id. at 378-79.

The Second Circuit considered the reach of the essential facilities doctrine in *Twin Laboratories, Inc. v. Weider Health Fitness*, 900 F.2d 566 (2d Cir. 1990). In that case, the court affirmed the district court's grant of summary judgment in favor of Weider on the essential facilities claim. *Id.* at 569. Weider sold nutritional supplements and published the most widely read magazines catering to those interested in body building. Twin Labs competed with Weider in the market for nutritional supplements, and advertised its products in Weider's magazines. Weider

then changed its policies and refused to include Twin Labs' advertisements in its magazines. Twin Labs sued, arguing that Weider's magazines amounted to an essential facility for competition in the nutritional supplement market, and that Weider's exclusion of Twin Labs therefore violated Section 2. *Id.* at 567-68.

The Second Circuit held that, as a matter of law, "Weider's conduct did not amount to an antitrust violation." *Id.* at 569. Twin Labs failed to demonstrate a "severe handicap" as a result of Weider's denial of access, a necessary element of a successful essential facilities claim. The opinion turns on the court's view that Weider's power to exclude advertising from its magazine did not amount to the power to *eliminate* competition in the downstream nutritional supplements market. *Id.* at 569-70. While Weider did have power to impose *some* handicap on his competition, this limited power was insufficient to establish that Weider's facility was "essential." The court said:

> A successful "essential facilities" plaintiff must prove that denial of access has caused it "severe handicap." . . . Twinlab's own expert, Dr. Overstreet, stated that, six months after Weider's advertising ban, Twinlab's nutritional supplements were not only continuing to grow more profitable but were continuing to increase their market share relative to Weider's products. While Dr. Overstreet stated that in his opinion Twinlab's growth would have been even more rapid but for the advertising ban, this hardly constitutes a showing of severe hardship . . . .
>
> [A]s the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.

Id. at 569-70 (citations omitted).[10]

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10 As the Weider court noted, some commentators have suggested that the essential facilities doctrine be applied only to facilities that are "'natural

Weider, Olympia, and *MCI* share a concern that transcends their fact-based differences. A facility that is controlled by a single firm will be considered "essential" only if control of the facility carries with it the power to *eliminate* competition in the downstream market.[11]

In the instant case, it is clear that defendants' control of their CRSs did not give them power to eliminate competition in the downstream air transportation market.[12] Basic economic theory tells us that plaintiffs will withdraw from SABRE or Apollo if the cost of using either CRS causes the cost to the airline of providing a flight booked on a CRS to exceed the revenue that the airline

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monopol[ies], facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately.'" *Id.* at 569 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.2 at 680-81 (1988 Supp.)). The reason for such a limitation is that control of a natural monopoly facility gives the facility holder a power to eliminate downstream competition that is permanent even in theory, as well as in practice. *See* 3 P. Areeda & D. Turner, *Antitrust Law* 47-48 (1978). Such a strict limitation goes further than *Weider*, and perhaps *Olympia*.

11 The cases also seem to contemplate a second condition that must be satisfied for a facility to be considered "essential" in addition to the power to eliminate competition: The power to eliminate competition must not be momentary, but must be at least relatively permanent. *See MCI*, 708 F.2d at 1133 (discussing virtual impossibility of duplicating AT & T's local distribution facilities); *Olympia*, 797 F.2d at 379 (discussing possibility that Olympia "remained free to compete by sending salesmen to call on Western Union's subscribers."). In the instant case we need not decide whether defendants' control of their respective CRSs gave them power that was of sufficient permanence for the CRSs to qualify as essential facilities. For we conclude that the *extent* of the power bestowed on defendants by Apollo and SABRE, quite apart from the *duration* of this power, was insufficient.

12 Monopoly control of the upstream market is a necessary element of essential facility and monopoly leveraging claims. Defendants contend that plaintiffs' claims fail as a matter of law because the jury has decided that defendants do not have monopoly control in the upstream CRS market.

However, the jury did not directly consider whether defendants had monopoly power in the CRS market for services to airlines. The jury was specifically instructed to consider only whether defendants possessed monopoly power over the travel agent participants in the CRS market. Since jurors are presumed to follow the instructions given, *see United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir.), *cert. denied*, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d

gains by providing the flight. *See* Trade Regulation App. B; E. Sullivan & J. Harrison, *Understanding Antitrust and its Economic Implications* 22 (1988). It is difficult to imagine that a travel agent would subscribe to a CRS if it only contained information about 12-14% of available flights. Because the parties agree that neither United nor American controlled more than 12-14% of the air transportation market, SABRE and Apollo would contain information concerning approximately 12-14% of available flights if competitors withdrew from either SABRE and Apollo. Thus, the ability of United or American to abuse their downstream competitors by manipulating their CRSs is severely limited.

Moreover, United and American have never refused any of the plaintiffs access to their respective CRSs.[13] *See Otter Tail*, 410 U.S. at 378, 93 S.Ct. at 1030 (outright refusal); *MCI*, 708 F.2d at 1132 (same). Rather, United and American have always given all of their competitors in the air transportation market such access for a fee. Neither United nor American have ever set this fee at a level that would drive their competitors away. As noted above, it is unlikely that defendants would set their fee at such a

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71 (1980), we reject defendants' contention that the jury directly considered the extent of defendants' monopoly power over plaintiffs.

Neither did the jury *implicitly* decide that defendants lacked monopoly power over plaintiffs. *See In re Westgate-Cal. Corp.*, 642 F.2d 1174, 1176 (9th Cir.1981) (holding that collateral estoppel barred plaintiff's claim because the jury's previous decision that plaintiff had engaged in fraud effectively resolved the newly presented question whether plaintiff had acted inequitably). Plaintiffs and the travel agent participants in the CRS market are not similarly situated. Plaintiffs alleged that they had no real alternative to membership in either SABRE or Apollo because withdrawal would result in a business loss of such magnitude that no member airline could withstand it. In contrast, aside from contractual limitations, travel agents can switch CRSs whenever they desire. A travel agent must belong to only one CRS to obtain the information that she needs to operate her business, and there are a number of CRSs to which the travel agent may subscribe. This factual difference indicates that the jury's decision could not have included a finding that the defendants had monopoly power over plaintiffs.

13 We do not reach the question of whether at some level, charging a price may be the same as an outright refusal to deal.

level, for, if they did, they would destroy their CRSs rather than their competition.

Plaintiffs claim that each defendant's CRS was an "essential" facility because each defendant's control of its CRS gave it power to redistribute a portion of its rivals' revenues to itself. Plaintiffs make this claim even though they concede that each defendant's control of its CRS did not create a dangerous probability that the defendants would monopolize the downstream air transportation market. Although each defendant may have gained some leverage over its competitors through control of its CRS, each defendant's power fell far short of the power to *eliminate* competition seen in *Otter Tail* and *MCI*. At most, defendants gained a monetary profit at their rivals' expense. The exercise of this limited power is not actionable under Section 2.[14]

Our view of the essential facilities doctrine does not render the doctrine superfluous or otherwise inappropriately curtail its reach. When a firm's power to exclude rivals from a facility gives the firm the power to eliminate competition in a market downstream from the facility, and the firm excludes at least some of its competitors, the danger that the firm will monopolize the downstream market is clear. In this circumstance, a finding of monopolization, or at least attempted monopolization, is appropriate, and there is little need to engage in the usual lengthy analysis of factors such as intent. *Cf. Catlin*, 791 F.2d at 1348 (specifying the elements of a claim for attempted monopolization). We hold that neither defendant denied plaintiffs an essential facility in violation of the antitrust laws.

C

Plaintiffs next allege that each defendant violated Section 2 by "leveraging" its monopoly power over its competitors in the

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14 We highlight that this is not a case in which a facility holder has the power to eliminate competition in a downstream market, but has as yet exercised its power to only a limited extent. The essential facilities doctrine, consistent with principles underlying section 2, might well reach such conduct, because in that situation, the danger of monopolization may be immediate enough to satisfy the Act.

CRS market to gain a competitive advantage over these airlines in the downstream air transportation market.[15] Plaintiffs admit that, because there was no dangerous probability that either defendant would monopolize the downstream air transportation market, they have no claim under the traditional Section 2 doctrine of attempted monopolization. This circuit expressly declined to decide whether "monopoly leveraging is a distinct Section 2 violation" in *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir.1986).

The origin of the notion that a single firm may be liable for "monopoly leveraging," even in the absence of a threat that the "leveraged" market will be monopolized, is *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). In *Berkey Photo*, Kodak possessed a monopoly in the film and camera markets. Berkey Photo argued that Kodak had "leveraged" its dominant position in these areas to gain a "competitive advantage" in the photofinishing equipment and services markets. Berkey Photo conceded that there was no dangerous probability that Kodak could monopolize either of these markets. *Id.* at 275.

The *Berkey Photo* court announced and applied the rule that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an

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15 Defendants claim that plaintiffs waived their monopoly leveraging claim by failing to raise the claim in the district court. It is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below. *See Image Technical Service, Inc. v. Eastman Kodak*, 903 F.2d 612, 615 n. 1 (9th Cir.1990) (holding that plaintiff's failure to raise an issue in opposition to a defendant's motion for summary judgment waived the issue), *cert. granted*, ___ U.S. ___, 111 S.Ct. 2823, 115 L.Ed.2d 994 (1991); *Munoz*, 746 F.2d at 1390 (refusing to consider a tort theory not raised in contract action below). However, there is no factual basis supporting defendants' contention. First, plaintiffs raised the monopoly leveraging claim at the outset of their action. Second, although plaintiffs emphasized the essential facilities theory in their response to defendants' motion for summary judgment, they also discussed *Griffith*, a monopoly leveraging case, and mentioned the monopoly leveraging doctrine. Most importantly, the district court discussed the theory at length. *See In Re Air Passenger Computer Reservation System Antitrust Litigation*, 694 F.Supp. at 1472-75. Thus, we reject defendants' waiver argument.

attempt to monopolize the second market." *Id.* In contrast to the traditional actions for monopoly and attempted monopoly, *Berkey Photo's* "monopoly leveraging" doctrine has only two rather loose elements: 1) there must be monopoly power in some market, and 2) such power must be "exercise[d] . . . to the detriment of competition" in another market. The *Berkey Photo* court slighted the functions performed by the elements of the traditional Section 2 offenses, stating: "There is no reason to allow the exercise of [monopoly] power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable." *Id.* at 275.

We now reject *Berkey's* monopoly leveraging doctrine as an independent theory of liability under Section 2. Even in the two-market situation, a plaintiff cannot establish a violation of Section 2 without proving that the defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market. We believe that *Berkey Photo* misapplied the elements of Section 2 by concluding that a firm violates Section 2 merely by obtaining a competitive advantage in the second market, even in the absence of an attempt to monopolize the leveraged market.[16]

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16 Plaintiffs also rely on two other cases, neither of which need be addressed at length. First, although *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948), does contain some broad language, it is not controlling since it is a Section 1 case involving concerted action. *See Copperweld*, 467 U.S. at 774-77, 104 S.Ct. at 2743-45 (noting the difference between Section 1's focus on concerted activity and Section 2's focus on unilateral activity).

Plaintiffs also cite *Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir.1988), *cert. dismissed sub nom., G.K.C. Mich. Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087, 109 S.Ct. 2461, 104 L.Ed.2d 982 (1989). In *Kerasotes*, the Sixth Circuit held that the use of monopoly power in one market to gain a competitive advantage in a second market is forbidden, even when there is no danger of monopolization in the second market. *Id.* at 137-38. *Kerasotes* is in error for the same reasons that *Berkey Photo* is in error.

1

As traditionally interpreted, the Sherman Act punishes any individual or entity that uses "predatory" means to attain a monopoly, or to perpetuate a monopoly after the competitive superiority that originally gave rise to the monopoly has faded. *See Aspen Skiing Co.*, 472 U.S. at 602, 610-11, 105 S.Ct. at 2857, 2861-62 (upholding liability of a monopolist that had used predatory conduct to attain or preserve monopoly power); *Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. at 1703-04. A monopoly attained or perpetuated by such means unnecessarily raises the cost of the relevant product or service, with the ultimate victim being the consumer. *See United States v. Syufy Enterprises*, 903 F.2d 659, 663 (9th Cir. 1990); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir.1945).

However, the Sherman Act does not attack every monopoly. *See Aspen Skiing Co.*, 472 U.S. at 602, 105 S.Ct. at 2857 (holding that predatory conduct to attain or preserve a monopoly is a prerequisite to a finding of monopolization or attempted monopolization); *Syufy Enterprises*, 903 F.2d at 668 (stating that "[w]hile the successful competitor should not be raised above the law, neither should he be held down by law"); *Olympia*, 797 F.2d at 375-76 ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."); *Foremost*, 703 F.2d at 543-44 ("[T]he Sherman Act . . . does not render unlawful all monopolies. . . . A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."). A firm may acquire a monopoly simply by virtue of being a better competitor. For example, a firm may have better production methods or be more innovative than its past and prospective competitors. *Aspen Skiing Co.*, 472 U.S. at 604, 105 S.Ct. at 2858; *Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. at 1703-04; *Syufy Enterprises*, 903 F.2d at 668; *Aluminum Co. of Am.*, 148 F.2d at 430. This kind of monopoly, absent "predatory" practices to maintain it, will continue only so long as the monopolist sustains a level of efficiency or innovation such that its rivals cannot effectively compete. Because this type of monopolist

behaves in an economically efficient manner, the antitrust laws do not stand as an obstacle to its existence. *See Syufy Enterprises*, 903 F.2d at 668; *Olympia*, 797 F.2d at 375-76; *Foremost*, 703 F.2d at 544; *see also* P. Areeda & D. Turner, *Antitrust Law*, at 41-42, 60-63, 68-71 (1978).

There is also at least one other type of lawful monopoly—the natural monopoly. Such a monopoly occurs when:

> There may not be room enough in the market for more than one firm . . . . In that case, demand is "too thin" to support two surviving firms. Monopoly is inevitable . . . . [For example, t]he entire natural gas consumption of a region of the country may be insufficient to support a second pipeline from a remote producing region. Demand may total millions of dollars annually and yet be "too thin" relative to the minimum efficient scale of a long-distance natural gas pipeline, a hydroelectric power generator, or a fully automated machine-tool production line. In these cases, demand m[ight] be sufficient *at some price* fixed by law . . ., but the cost of production will be significantly lower with a single producer. In that event, one producer can earn larger profits by charging less [than a number of producers of inefficient scale would be able to charge] in order to win a larger volume of business that will permit him to produce at lower unit costs. Local public utilities supplying electricity, gas, water, and telephone service are usually regarded as classic examples . . .

P. Areeda & D. Turner, *supra*, at 47-48.

The antitrust laws tolerate both efficient monopolies and natural monopolies. *See Foremost*, 703 F.2d at 543. The Sherman Act has not been interpreted to penalize efficient monopolies because they meet consumer demand without raising the price and gaining a monopoly profit. *Syufy Enterprises*, 903 F.2d at 668; *see also Berkey*, 603 F.2d at 294. The Sherman Act also has not been interpreted to penalize natural monopolies. A firm that creates a valued service or product should not be punished with

treble damages and criminal sanctions merely because the firm finds itself to be the holder of a natural monopoly. *Aluminum Co. of Am.*, 148 F.2d at 429-30 (reasoning that those who find themselves holders of a natural monopoly should not be subject to Sherman Act sanctions). Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for the difficulties posed by natural monopolies. *See* Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 Cornell L.Rev. 303, 304 (1980). "[J]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us." *Berkey Photo*, 603 F.2d at 294 (citations omitted); *see also* Areeda, *supra*, at 845, 853.

Thus, the elements of the established actions for "monopolization" and "attempted monopolization" are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other. *Berkey Photo's* monopoly leveraging doctrine fails to differentiate properly among monopolies. The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.

Monopoly leveraging is just one of a number of ways that a monopolist can permissibly benefit from its position. *See Berkey Photo*, 603 F.2d at 294; P. Areeda & D. Turner, *supra*, at 41-42; Trade Regulation App. B; E. Sullivan & J. Harrison, *supra*, at 19-27. This does not mean, however, that such conduct is anticompetitive. Both "monopoly leveraging" in an adjacent market, and setting high prices in the original "monopoly" market, represent the cost that we incur when we permit efficient

and natural monopolies.[17] *See Berkey Photo*, 603 F.2d at 294 ("setting a high price may be a use of monopoly power, but it is not in itself anticompetitive"). The Supreme Court has consistently held that there must be "predatory" conduct to attain or perpetuate a monopoly for a monopolist to be liable under Section 2. *Aspen Skiing Co.*, 472 U.S. at 596 n. 19, 602, 105 S.Ct. at 2854 n. 19; *Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. at 1703-04; *see also Syufy Enterprises*, 903 F.2d at 669 ("[f]ostering an environment where businesses fight it out using the weapon of efficiency and consumer goodwill is what the antitrust laws are meant to champion."). We hesitate to disregard this settled rule in the absence of any meaningful substantive distinction between monopoly leveraging and other consequences of lawful monopoly.

The danger that a lawful monopoly will either create a new monopoly or unduly perpetuate itself is no more evident when a lawful monopoly is leveraged than when a lawful monopolist reaps its monopoly profit solely from price increases in the monopoly market. Indeed, leveraging activity may tend to *undermine* monopoly power, just like monopoly pricing. Every time the monopolist asserts its market dominance on a firm in the leveraged market, the leveraged firm has more incentive to find an alternative supplier, which in turn gives alternate suppliers more reason to think that they can compete with the monopolist. Every act exploiting monopoly power to the disadvantage of the monopoly's customers hastens the monopoly's end by making the potential competition more attractive. P. Areeda & D. Turner, *supra*, at 41-42; *see also Berkey Photo*, 603 F.2d at 294 (applying this principle to monopoly pricing).

Berkey Photo errs by straying from the Sherman Act's focus on the problem of the *creation, or attempted creation, of a monopoly* through monopoly leveraging. Yet the antitrust laws seek to punish only the willful attainment and maintenance of a

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17 We highlight that this case does not involve the special problem of a regulated monopolist (usually a natural monopolist) that seeks to evade regulations which limit profits in the monopoly market by creeping into adjacent, unregulated markets. Such a case might present very different issues.

monopoly, or the attempt to attain such a monopoly. If there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the doctrine of attempted monopoly.

V

We conclude that defendants' CRSs were not essential facilities, and we reject *Berkey Photo's* monopoly leveraging doctrine.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MDL No. 667-ER.
Civ. Nos. 86-0696-ER(Mcx),
86-0697-ER(Mcx), 84-5185-ER(Mcx) and
84-8918-ER(Tx).

In re AIR PASSENGER COMPUTER
RESERVATIONS SYSTEMS ANTITRUST LITIGATION.

CONTINENTAL AIR LINES, INC., and
TEXAS INTERNATIONAL AIRLINES, INC.,
Plaintiffs,
v.
AMERICAN AIRLINES, INC., and UNITED AIR LINES, INC.,
Defendants

NEW YORK AIRLINES, INC., Plaintiff,
v.
AMERICAN AIRLINES, INC., and UNITED AIR LINES, INC.,
Defendants.

USAIR, INC., PACIFIC SOUTHWEST AIRLINES, INC., AIRCAL,
INC., OZARK AIR LINES, INC., MUSE AIR CORPORATION,
ALASKA AIRLINES, INC., MIDWAY AIRLINES, INC.,
NORTHWEST AIRLINES, INC., and WESTERN AIR LINES, INC.,
Plaintiffs,
v.
AMERICAN AIRLINES, INC., and UNITED AIR LINES, INC.,
Defendants.

AMERICAN AIRLINES, INC.
Counterclaimant,
v.
USAIR, INC., PACIFIC SOUTHWEST AIRLINES, INC., AIRCAL,
INC., OZARK AIR LINES, INC., MUSE AIR CORPORATION,
ALASKA AIRLINES, INC., MIDWAY AIRLINES, INC.,
NORTHWEST AIRLINES, INC., and WESTERN AIR LINES, INC.,
Counterdefendants.

PACIFIC EXPRESS, INC., and PACIFIC EXPRESS HOLDING CO.,
Plaintiffs,
v.
UNITED AIR LINES, INC., Defendant.

August 25, 1988.

AMENDED MEMORANDUM DECISION AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT ON SECTION TWO SHERMAN ACT CLAIMS

RAFEEDIE, District Judge.

The captioned case came on for hearing before this Court, the Honorable Edward Rafeedie, United States District Judge, presiding, on August 8, 1988. The following motions were heard; Defendant United Airlines ("United") and American Airlines' ("American") Motions for Summary Judgment on plaintiffs' claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiff Continental's Motions for Partial Summary Judgment: (1) that Defendants' Computerized Reservations Systems are Essential Facilities, (2) that Defendants did not allow Equal Access to their Essential Facilities, and (3) that Defendants have Monopoly Power.

The Court, having read and considered the papers submitted, and the argument of counsel at the hearing, orders that summary judgment should be granted in part, and denied in part, for the reasons stated in this Memorandum Decision and Order.

FACTUAL BACKGROUND

This case arises out of defendants' ownership of Computerized Reservation Systems ("CRS"). A CRS is composed of computer terminals and printers in travel agents' offices

which are telephonically linked to the vendor's computer. This equipment enables the travel agent to send and receive air transportation booking information, book flights and print out a ticket. These CRSs are owned by various airlines and each system contains flight information for airlines other than the vendor airline. The vendor charges the travel agent for the use of its system and they charge other airlines fees for booking air transportation through the CRS.

Defendant American owns the world's largest CRS, SABRE, which is comprised of six IBM mainframe computers that are connected to nearly 100,000 other devices, including computer terminals, ticket printers, and boarding pass printers. More than 11,000 travel agency locations use SABRE to handle airline as well as hotel and car reservations for their clients. SABRE contains schedules for more than 650 airlines and projects more than one year into the future. SABRE processes over 10 million reservations a month.

Defendant United was the first company to announce plans to market a CRS. United's CRS, Apollo, has been the second largest CRS in the world with an estimated market share of 23% of all travel agency locations. In 1981, Apollo claimed a 39% market share. SABRE's market share is in the 30% range, down from 40% in 1980. The market also includes SystemOne (or SODA), owned by Eastern Airlines, PARS is run by TWA, and DATAS II is owned by Delta.

Originally, travel agents paid a fee for CRS equipment rental and other services, while airlines were not charged for participating in the CRS or for bookings. The vendor airline, however, received substantial revenue form additional airline business they received through "biasing" the system. Biasing is the practice of displaying flight information in a way that favors the vendor airline. The travel agent inputs its client's preferences and the CRS displays, in order of desirability, the various flights. However, each system was biased, to differing degrees, so that the desirability of the vendor's flights would be artificially inflated.

In the late 1970's, SABRE and Apollo began signing carriers to "cohost contracts" under which the contracting carrier's product would receive preferential treatment in the CRS in return for a fee paid on each booking which the carrier received through the CRS. Beginning in 1981, vendor airlines began entering into individually negotiated contracts with each airline, and booking fees rose from $0.25 per booking up to $3.00 per booking.

In August 1984, the Civil Aeronautics Board ("CAB") established a number of rules governing the practices of CRS vendors. Those rules required each CRS vendor to make available an unbiased primary display, to charge all carriers participating in its CRS the same booking fees for the same level of service, and to make CRS marketing data available for sale. The CAB declined to regulate booking fees. 49 C.F.R. 255.

In response to the CAB rules, American announced it would charge $1.75 for booking, and United followed with a $1.85 booking fee. Competing CRS vendors are currently charging the following fees: the SystemOne fees are $1.75 and $2.00 for direct access, the PARS fees are $1.75 and $2.00 for direct access, and the DATAS II fees are $1.50 and $1.75 for direct access.

I. Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure states that the court shall enter judgment if "the pleadings, depositions [and] affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The nonmoving party must show there is a genuine issue of fact if the specific facts set forth by the moving party, coupled with undisputed contextual or background facts, are such that a rational or reasonable jury might return a verdict in its favor based on the evidence. *T.W. Electrical Service v. Pacific Electrical Contractors*, 809 F.2d 626 (9th Cir. 1987). The nonmoving party can meet this burden with any kind of evidence listed in Federal Rule 56(c), but the pleadings alone are not enough. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All that is required at this stage is that sufficient evidence supporting the claimed factual

dispute be shown to require a factfinder to resolve the parties' disputing versions of the truth at trial. *T.W. Electrical*, 809 F.2d at 630. The judge is not to weigh conflicting evidence with respect to disputed material facts, nor should the judge make credibility determinations with respect to statements in the affidavits. At summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party. *Id.*

The Supreme Court has plainly stated that the standard for summary judgment applies equally to antitrust cases as it does to any other case. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

II. Essential Facilities Doctrine[1]

The essential facilities doctrine imposes on a business that controls an essential facility the obligation to provide its competitors reasonable access to that facility. *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979). An essential facility is one which cannot be reasonably duplicated and to which access is necessary if one wishes to compete. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986). A refusal to deal in this context violates section 2 because control of an essential facility can "extend monopoly power from one stage of production to another, and from one market into another." *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

A facility or resource is "essential" when competitors must have access to the facility to meaningfully be able to compete with the firm controlling the facility. Holmes, *1987 Antitrust Law Handbook*, section 2.06, at 175. The doctrine has been applied to electric transmission lines, football and basketball stadiums, downhill ski hills, natural gas pipelines, and local telephone facilities. To be essential, "a facility need not be indispensable; it is sufficient if duplication of the facility would be economically

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1 For the sake of simplicity this section will refer only to American and SABRE. There are no relevant factual distinctions between the claims against United and American for purposes of the essential facilities doctrine.

infeasible and if denial of its use inflicts a severe handicap on potential market entrants." *Fishman*, 807 F.2d at 539 (quoting, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978)). "The point of the essential facilities doctrine is that a potential market entrant should not be forced simultaneously to enter a second market, with its own large capital requirements." *Fishman*, 807 F.2d at 540. A participant in the downstream market, who also controls a facility which is deemed essential to the downstream market, has the power to increase the costs of market entry through its control of the essential facility. The facility owner has the power to monopolize the market to which his facility is the "bottleneck." *Id.*; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952).

Plaintiff's contend that SABRE is an essential facility for domestic airlines; that is, SABRE confers exclusive access to a large number of travel agents, and all domestic airlines are dependent on SABRE because no airlines can afford to forgo access to the SABRE travel agents, therefore, rival CRSs are not substitutes for SABRE. It is argued that American, as the major CRS vendor, holds all other airlines captive by virtue of the essential need for access to the SABRE travel agents.

American contends that this is simply not an essential facilities case. In a normal case brought under this doctrine, the facility at issue constitutes a bottleneck to competition in the downstream market. Control of the bottleneck by a competitor can foreclose competition in the underlying market. For example, in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), the railroad combination's denial of the use of its terminal facilities to non-member railroads would have foreclosed "any other reasonable means of entering the city" to the non-members, making it impossible to gain access to St. Louis. In the *MCI* case, foreclosure of access to local telephone distribution channels precluded MCI from competing in the long distance telephone service market because access to the local distribution channels is necessary to providing long

distance service. The court stated that, given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. Therefore, it would not be economically feasible for MCI to duplicate AT & T's local distribution facilities. Such duplication would involve laying millions of miles of cable and line to individual homes and businesses, and regulatory authorization could not be obtained for such an uneconomical duplication. *MCI*, 708 F.2d at 1133. Similarly, in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), a regulated electric utility refused to sell power wholesale, or to transmit power purchased from other sources to municipalities which had chosen to own their own retail distribution systems. The electric utility's facility for transmitting electric power was essential to competition in the downstream market for the retail distribution of electric power. Again, the facility was along the lines of a natural monopoly. That is, duplication of the facility would be an inefficient waste of resources where the one facility is all that is needed, absent anticompetitive conduct by the facility owner with respect to a downstream market. The antitrust laws will relieve a competitor of the need to build its own production facilities only where the market will not support more than one. *Fishman*, 807 F.2d at 574 (Easterbrook, dissenting). See, *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 665 F. Supp. 1493 (S.D.Fla.1987) (a gas pipeline was deemed essential based upon the increased costs of gas which would be caused by the uneconomical duplication of an existing pipeline).

In *Fishman*, the Seventh Circuit upheld the district court's finding that the Chicago Stadium was the only stadium in the Chicago Metropolitan area which was suitable for the exhibition of professional basketball, and that it could not feasibly be duplicated by plaintiffs. Since building a new stadium would cost $19 million, and the basketball franchise was substantially less expensive than a stadium, the court held that duplication of the facility would be unreasonable. On this basis, the court held that the Chicago Stadium was essential to competition in the market for the exhibition of professional basketball in Chicago. *Fishman*, 807 F.2d 539-40. See, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982

(D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978) (football stadium in Washington D.C. deemed essential to market for professional football exhibition).

In this case, there are channels of distribution other than SABRE because there are computerized reservation systems in competition with SABRE. Thus, plaintiffs can look to other systems for alternative channels of distribution and are not forced to enter the market for CRSs in order to compete in the downstream market of airline transportation. Nevertheless, plaintiffs claim that SABRE is essential because the other CRSs are not effective substitutes for SABRE.

Under ideal market conditions, the absence of an airline from SABRE would decrease SABRE's attractiveness to travel agents and cause them to seek out better systems. Continental, however, points to a number of market imperfections which allegedly impair better CRSs from attracting SABRE agents.

American's contracts with SABRE travel agents contain provisions which plaintiffs argue make it very difficult for an agent to switch CRS systems. The contracts contain a SABRE usage clause ("parity of usage rule")[2], a liquidated damages provision and roll-over provisions. American's "minimum of parity" rule required new subscribers to have at least as many SABRE Computerized Reservation Terminals ("CRTs") as there are non-SABRE CRTs at each location.[3] American also regularly employ five year term contracts which contained a provision requiring a SABRE agent to sign a new five year contract whenever any new piece of equipment is installed or even replaced during the life of the existing contract. Finally, the liquidated damages provision in the contracts (installed after the anti-bias rules became effective) is (typically) as follows; 80% of the agent's contract fee plus 200 (the average monthly segment booking per SABRE CRT) multiplied by the $1.75 segment fee

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2 The minimum of parity ruled was outlawed by the CAB in 1984.

3 United had a 95% rule, which required 95% of United's bookings through an Apollo agent to be made through Apollo.

multiplied by the number of SABRE CRTs in place multiplied by the remaining months of the contract.

Plaintiffs continue the attack by arguing that travel agents have strong economic incentives to carry only one CRS. First, the installation of a CRS, or additional CRSs, imposes significant costs on the agency in terms of both equipment and training. For example, the average SABRE and Apollo subscriber fees per year per agency location (not agency) in 1986 were $10,596 and $12,763, respectively. Thus, agents are unlikely to switch to another CRS unless the costs of conversion are paid for by the new vendor. Second, the minimum of parity rule constitutes a contractual restriction on the subscribing agents use of other CRSs.

Finally, plaintiffs point out that the airline industry has always been characterized by narrow operating margins, therefore, even slight reductions in sales have a disproportionately adverse impact on profits and the carrier's ability to compete.

These contractual provisions and the structure of the air transportation market are claimed to prevent effective competition in the CRS market, and consequently, justify plaintiffs' argument that SABRE is an essential facility to the air transportation market despite the existence of competing CRSs. Plaintiffs' point to the conclusions of government regulatory bodies and Judge Posner's opinion for the court in *United Airlines, Inc. v. C.A.B.*, 766 F.2d 1107 (7th Cir. 1985) where the court upheld the CAB's antibias rule. In *United*, the court wrote:

> Unless an airline limits its operations to one small region, it must, whether or not it has its own computerized reservation system, persuade several of the largest airlines to list its flights in their [CRS] systems if it is to have a fair chance of success. It is thus dependent for an essential facility on what may be its principal competitors. *Id.* at 1114.

Judge Posner's opinion has a number of helpful observations. First, it is necessary to put the case in its proper perspective.

The Seventh Circuit held, as a matter of administrative law, that the CAB's exercise of rulemaking authority was within the scope delegated by Congress through the Federal Trade Commission Act, section 5, as amended 15 U.S.C. § 45, and the Federal Aviation Act of 1958, section 411, 49 U.S.C. App. § 1381. Under these statutory provisions the CAB can forbid anticompetitive practices "*before* they become serious enough to violate the Sherman Act." *United*, 766 F.2d at 1114. The court ruled that the Board's ruling was "plausible, if not compelling, [and its] rules can not be set aside as arbitrary and capricious." *Id.* at 1116. Therefore, the Seventh Circuit did *not* rule that Apollo was an essential facility, it merely held that the Board's analysis was not arbitrary and capricious in light of its statutory authority. Thus, the Board has the power to outlaw conduct which may *restrain* competition.

More interesting, however, are Judge Posner's comments on the CRS market:

> If the owner of a computerized reservation system used the system to weaken competition from other airlines, it is a little hard to see why those airlines would not simply switch their patronage to a competing system that was not biased against them. Competition would (one might have thought) force at least some of the owners of competing systems to offer unbiased listings in order to expand the market for their systems. Even if every airline owner refused, because of the impact on its air transportation revenues, to give equal prominence to a competitor's flights, there is nothing to stop independent companies from offering a computerized reservation system with no such inhibitions—and one does.

The court, however, goes on to state that an airline needs to be listed "at least in the largest" CRSs. "Of course, if the owner of a system charges such a high price that no competing airline will pay it, the owner is hurt. It not only loses revenues from that airline; its system will be worth less to travel agents if it contains less information. But the owner may be able to extract a high enough price from competitors to slow their growth; indeed, that

may be the purpose of the high prices." *Id.* at 1115. In sum, the CRS vendor will charge as high a price as it can without losing participating airlines (and thereby decreasing the attractiveness of its' CRS). Similarly, with respect to display bias, the CRS vendor "hope[s] to gain more business by complicating the marketing of competing services than it would lose to travel agents by providing them with less flight information." *Id.*

The question is whether the entry barriers to a competing CRS (with respect to access to SABRE agents) are sufficient to qualify SABRE as an essential facility. An entry barrier is either (a) "a condition that makes the long run costs of a new entrant into the market higher than the long run costs of the existing firms in the market", or more broadly, (b) "heavy start-up costs required for entry into the market." Posner, *Economic Analysis of Law*, section 10.9, p. 290 (3rd ed. 1986). In a hypothetical market without any entry barriers, a seller charging more than his marginal costs (which includes "competitive profits"—profits sufficient to maintain the seller's investment in the industry) reaps "monopoly profits" which will attract increased output in the form of new firms entering the market and increased output from firms already in the market. Entry barriers, however, serve to stave off increased industry output beyond the threshold point established in the hypothetical market: that point being when a seller's price is greater than his marginal costs. The seller's ability to reap monopoly profits depends upon the significance of the entry barriers. In this case, the contractual provisions of the SABRE leases raise the cost of entering the market for access to SABRE agents. However, the entry barriers do not foreclose competition in the market. Rather, they raise the cost of entry to the extent that it is expensive for a travel agent to attain dual-CRS capacity.

The significance of the entry barriers, however, are exaggerated by plaintiffs. Assuming that American uses SABRE to weaken competition in the air transportation market by providing biased information, or by charging exorbitant booking fees, there will be an increased incentive for travel agents to attain dual or multiple CRS capability. Moreover, American's anticompetitive

action will create an incentive for other CRSs to reduce bias and/or booking fees in an attempt to capture the SABRE agent market. The costs of making SABRE agents dual-CRS-capable can be shared by the agents, airlines and CRS vendors, all of whom have an incentive to widen the market if SABRE is an unattractive product.

While American may be able to extract supracompetitive booking fees in the CRS market, and such price increases do create entry barriers in the air transportation market by raising competitors' costs, the entry barrier in the air transportation market is not significant enough to create a danger of monopolization under the circumstances. Just because defendant may be extracting monopoly profits in one market does not inevitably lead to the conclusion that its power in an affected market is also significant enough to confer monopoly power in the related market.

Under Section 2 of the Sherman Act, a firm must provide reasonable access to an essential facility in order to prevent that firm from extending its monopoly power from one market into another. *MCI*, 708 F.2d at 1132. The evil at which the doctrine is aimed is monopolization of the underlying market. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the Court recognized that the Sherman Act contains a "basic distinction between concerted and independent action," and that distinction is embodied in sections 1 and 2 of the Act. In *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2739, 81 L.Ed.2d 628 (1984), the Court considered the policy differences between claims brought under section 1 and section 2 of the Sherman Act. Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. 15 U.S.C. § 2.

In contrast, section 1 provides: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . ." 15 U.S.C. § 1.

The "conduct of a single firm is governed by section 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld*, 467 U.S. at 767, 104 S.Ct. at 2739. "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Id.* Partially because "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms *only when they pose a danger of monopolization.*" *Id.* at 767-68, 104 S.Ct. at 2740; *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) ("a single firm's conduct, absent the danger of monopolization, is not the object of antitrust scrutiny because to treat it with such scrutiny would heighten 'the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.'")

The essential facilities doctrine must be tied to the particular statutory provision under which relief is sought. The doctrine itself is an abstraction designed to assist courts in determining whether the statute has been violated. The starting point of statutory construction is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 (1985); *United States v. Hoffman*, 794 F.2d 1429, 1431-32 (9th Cir. 1986). The plain meaning of the statute is controlling "absent a clearly expressed Congressional intention to the contrary." *Hoffman*, 794 F.2d at 1432 (citing, *North Dakota v. United States*, 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983)). While section 1 of the Act precludes conspiracies in "restraint of trade," section 2 is targeted at "monopolization." As the Supreme Court has stated, the section 2 standard is less stringent than section 1 because it is often difficult for a court to distinguish between vigorous competition and anticompetitive conduct when analyzing the actions of a single firm. *Copperweld*, 467 U.S. at 768, 104 S.Ct. at 2740. Thus, the

Sherman Act authorizes scrutiny of single firms only when they pose a danger of monopolization. *Id.* Therefore, when applying the essential facilities doctrine in the context of section 2 of the Sherman Act, a facility should be deemed essential to the downstream market only where control of the facility by a competitor poses a danger of monopolization of the downstream market.

In this case, there is no danger that American will monopolize the market for air transportation. Looking at the facts in a light most favorable to the plaintiffs, American's conduct may restrain trade[4], but it does not threaten monopolization. Even if "entry barriers" to accessing SABRE agents are substantial enough to preclude a single airline from withdrawing from SABRE because SABRE agents will not look to other CRSs (or other sources of information) when making reservations, there is no danger that American will monopolize the air transportation market. As Judge Posner recognized, American is restrained by the existence of competing CRSs. Although there are costs (entry barriers) associated with leasing more than one CRS, these costs only partially insulate American from competition in the SABRE agent market. "[I]f the owner of a system charges such a high price that no competing airline will pay it, the owner is hurt. It not only loses revenues from that airline; *its system will be worth less to travel agents if it contains less information.*" Although the CRS owner may be able to "extract a high enough price from competitors to slow their growth," such a restraint of trade does not violate section 2 of the Act unless it poses a danger of monopolization. The existence of competing CRSs constitute a substitute for SABRE and constrain American's ability to weaken competition in the air transportation market.[5]

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4 That is, American may be able to raise its rival's costs through imposing monopoly prices in a related market. While the effect in the air transportation market may be enough to "restrain trade", it is not enough to create a danger of monopolization.

5 The parties have noted that under this court's essential facilities analysis, American's power was deemed to be dissipated by the existence of competing CRSs, while under the monopoly power and relevant market analysis, the court has found a factual issue as to whether American's market power is

American has never had more than a 14 percent share of the air transportation market. Although market share is, in itself, an insufficient indicator of market power, such a minimal share precludes a reasonable jury from finding monopolization. "There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute [market] power." P. Areeda & H. Hovenkamp, *Antitrust Law*, section 518.3c (1986 Supp.) (hereinafter P. Areeda & H. Hovenkamp). A claim that a twelve to fourteen percent market share confers monopoly power is absurd, absent a showing that the air transportation market is characterized by a low elasticity of demand or supply. The large number of competing airlines belies any contention that the industry is faced with low elasticity of supply. The court has also been presented with uncontroverted evidence that the airline industry is highly competitive from the demand side.

The USAir plaintiffs have argued that requiring a dangerous probability of successful monopolization of the underlying market renders the doctrine superfluous. This argument is not well taken. First, whenever courts have applied the doctrine, the facility at issue constituted a bottleneck to competition in the underlying market which created a danger that the facility owner would monopolize the underlying market.

Moreover, a competitor's failure to provide its competitors with access to a facility does not constitute "anticompetitive conduct" absent an essential facilities doctrine. The general rule is that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985). Thus, a firm with monopoly power has no general duty to help competitors by "pulling its competitive punches." *Olympia Equip. Leasing v. Western Union Tel.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987).

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limited by the existence of competing CRSs. This distinction is based upon the different markets at issue: The air transportation market and the CRS or SABRE market.

However, in *some circumstances*, failure to cooperate with a competitor may indicate probable anticompetitive effect where the monopolist lacks a business justification for its action. *Aspen*, 105 S.Ct. at 2859-60; *Olympia*, 797 F.2d at 378. The particular circumstances in which firms are required to provide a helping held to its competitors are not well defined in antitrust law. The essential facilities doctrine can be interpreted as a set of requirements[6] triggering a competitor's obligation to cooperate with a competitor. Absent the essential facilities doctrine, a firm's refusal to provide its competitors with access to its facility would not constitute anticompetitive conduct.

Therefore, requiring plaintiffs to show that denial of access to an essential facility creates a danger of monopolization does not render the essential facilities doctrine superfluous. Rather, the doctrine established the conditions for requiring a firm to cooperate with its competitors and thereby rendering the failure to provide reasonable access an anticompetitive act under section 2. Moreover, satisfaction of the doctrine's four internal requirements eliminates the need to prove that the firm had a specific intent to monopolize.

III. Monopolization[7]

A. Relevant Service Market

A determination of the relevant market usually requires an inquiry into the nature of the product, and the geographical area of effective competition. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 364 (9th Cir. 1988). Plaintiffs

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6 The following elements have been deemed necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of the use of a facility to a competitor; and (4) the feasibility of providing the facility. *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 983 (9th Cir. 1988).

7 This section will refer only to defendant American Airlines for the sake of simplicity. The analysis is equally applicable to defendant United Airlines.

claim that the relevant market in this case is the nationwide market for access to SABRE agents. Defendants argue that the relevant service market is the nationwide market for access to all CRS automated travel agents.

A relevant service market is the smallest service market for which (1) the elasticity of demand and (2) the elasticity of supply are sufficiently low that a firm with 100% of that market could profitably reduce output and increase price. "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade." *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978). Thus, products and services which are "reasonably interchangeable" for the same or similar uses normally should be included in the same product market for antitrust purposes. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979).

A particular brand may define a relevant market; "a relevant submarket in one's own products will exist if such a submarket is (a) sufficiently distinct in commercial reality, and (b) is relatively immune from competition of substitutes, or (c) was acquired by means that show an attempt to monpolize." *United States v. CBS, Inc.*, 459 F. Supp. 832 (C.D. Cal. 1978). As a legal matter, a firm's own product can constitute a distinct market only where the product is "so unique or so dominant" in the market that control over the product would virtually assure that competition in the market would be "destroyed." *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972).

A "market" is "any grouping of sales whose sellers . . . could raise prices *significantly* above the competitive level. If the sales of other producers *substantially constrain* the price-increasing ability of the [seller], they are part of the market." P. Areeda & H. Hovenkamp, at 311-12. It is true that products differing in brand name may have certain physical or service based differences which may be substantial. Furthermore, brand recognition may be substantial in many cases. Consequently, differentiated products are not perfectly interchangeable for consumers. "Unlike a perfectly competitive firm, a producer of a successfully differentiated product can raise his price above that of his rivals without losing all of his sales." P. Areeda & H. Hovenkamp, at

316. The question is whether "the degree of power inherent in each differentiated product is sufficient to make each brand a separate market for . . . monopolization purposes? The answer is almost uniformly negative." *Id.* at 316-17. The reason is, from a policy perspective, legal rules limiting a monopolist cease to make sense when applied to every producer of a differentiated product. From an economic perspective, producers engage in product differentiation *because* they are involved in a highly competitive market and are merely attempting to compete with other brands. Product differentiation is a public good created by competitive markets, and not an indication that competition is lacking in the product market. *Id.*

The ultimate question is whether other existing or potential CRSs significantly constrain the price-raising power of American. If the answer is yes, then these other CRSs must be grouped in the same "market" as SABRE.[8] However, if the other CRSs do not impair SABRE's ability to control prices or exclude competition, then the other CRSs can not be viewed as substitutes for SABRE.

The Supreme Court has suggested the following factors when determining the relevant market:

> The boundaries of such a submarket[9] may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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8 This "market" would be the market for access to CRS-automated travel agents.

9 The term "submarket" is used to refer to a distinct and economically relevant "market" which is drawn from a broader market. The term submarket will not be used in this memorandum because the prefix "sub" merely creates confusion and is superfluous. P. Areeda & H. Hovenkamp, at 312.

Brown Shoe v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1961); *Kaplan*, 611 F.2d at 292-93. Continental supports its claim that access to SABRE agents is a distinct service market by applying these factors.

There is evidence that the industry recognizes access to SABRE as a separate service from access to other CRSs. The fact that almost all airlines participate in virtually all CRSs is evidence that each airline perceives each CRS as a different service. Moreover, when United, TWA and American raised their booking fee to $1.75, no airline elected to participate in one of the lower priced CRSs (Eastern's SystemOne and Delta's DATAS II had rates of $.75) *and* bypass Apollo or SABRE. Rather, all airlines continued to participate in both systems. Evidence that American engaged in price discrimination prior to enactment of the 1984 CAB rules is also evidence that carries perceive the different CRSs as constituting different services. Finally, Continental points to evidence that American set its booking fees without regard to prices set by other CRS vendors. Despite disparity in pricing, demand for access to SABRE has not gone down. The apparent reason, according to Continental, for the low elasticity of demand is that access to SABRE provides a carrier with virtually the only practical access to SABRE-automated travel agents, since more than 90% of all SABRE agents only use SABRE.

The evidence amassed by Continental, however, does not support its contention that a reasonable jury could not find a broader market (such as the market for access to all CRS-automated travel agents) to be relevant in this case. Market definition is essentially a question of fact dependent upon the special characteristics of the industry involved. *Oahu*, 838 F.2d at 363 (citations omitted). The evidence provided does not compel a factfinder to conclude that other CRSs do not constrain American when it establishes booking fees for SABRE.

Continental's argument is based upon a static reading of the CRS market. The historical fact that almost all SABRE agents have only one CRS and that almost all carriers participate in virtually all of the major CRSs is not indicative of market power.

The apparent low elasticity of demand is meaningless unless it is complemented by low elasticity of supply.

> [D]efining a market . . . on the basis of demand considerations alone is erroneous. The function of defining a market is to determine that grouping of sales which, if controlled by a single firm . . ., could charge noncompetitive prices. But that is not possible if *either* demand or supply elasticity are high. Exploitative prices cannot be maintained on, say, children's shoes, if high prices induce consumers to shift to other products or induce producers of men's or women's shoes to make children's shoes.

P. Areeda & H. Hovenkamp, at 319.

Thus, although current market conditions suggest low demand elasticity, the existence of alternative channels of distribution such as competing CRSs indicate high supply elasticity. CRSs such as Apollo, PARS, DATAS II, and SystemOne provide essentially the same services as SABRE, except that SABRE is used in more travel agencies than the other CRSs. If SABRE began charging supracompetitive prices, then airlines would abandon SABRE, causing SABRE-automated travel agents to look to other CRSs. The existence of the other CRSs, therefore, constrain American's ability to set supracompetitive prices for SABRE. The existence of alternative CRSs suggests high supply elasticity, so there exists at least a factual dispute as to whether the relevant market is "access to SABRE agents."

The more interesting question is whether the court should characterize the market for CRS access as the relevant market as a matter of law. Although market definition is a factual matter, it is often properly decided on summary judgment because issues of market definition do not involve questions of motive or intent. *General Business Systems v. North American Phillips Corp.*, 699 F.2d 965 (9th Cir. 1983) (affirming granting of summary judgment for failure to present evidence of a relevant market). The question is whether a reasonable jury could conclude that

access to SABRE agents is a distinct service market, when viewed in the light most favorable to plaintiffs

Entry Barriers to Accessing SABRE-Agents

Plaintiffs have presented evidence that certain entry barriers preclude other CRS vendors from competing with American for access to SABRE agents. The existence of entry barriers suggest that elasticity of supply is low, despite the presence of alternative distribution channels. This conclusion is based upon the alleged "captive customers" relationship between SABRE and the SABRE-automated agents, maintained through long-term contracts and high liquidated damage clauses.

As stated earlier, plaintiffs argue that access to SABRE-automated agents is impaired through contractual provisions and the costs involved in making travel agents dual-CRS-capable. In defining a "market" the court must look to all products which substantially constrain the price-setting ability of the seller. Even if certain SABRE agents are stuck with long term contracts, American must make its product attractive to new travel agencies, SABRE agents whose contracts are expiring, and SABRE agents who can afford the extra expense of obtaining a second CRS. SABRE-automated agents can become ex-SABRE-automated agents as their contracts expire, or as they chose to become dual-CRS-capable. Competing CRSs can quickly expand output merely by setting up a terminal at the travel agent's office. Indeed, the virtual nonexistence of start-up costs[10] would permit a competing CRS to bear some of the financial burden of making a SABRE-agent dual CRS capable.

Defendants argue that plaintiffs' claim that SABRE is a separate market for purposes of section 2 must be based upon a further, unstated, assumption: that SABRE-automated travel agents have a "captive" group of customers who buy all their air transportation through the SABRE-agents, even if the SABRE-agents do not provide a competitive level of service. If consumers

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10 Since competing CRS vendors already exist, there is no need for firms to start from the ground up.

are not somehow held captive by their travel agents, then basic economic theory holds that they will seek out the best service available. There is no evidence that consumers are held captive by travel agents. The consumer's freedom effects the entire system so that travel agents will demand better service from its CRS vendor, and if such service is not given, the agent will either seek alternative methods for booking flights (other CRSs, direct booking by telephone, etc.), or go out of business and make way for more competitive travel agents. This competitive pressure constrains American from charging supracompetitive prices to the carriers because the CRS vendor needs to provide access to its CRS in order to make the service attractive to travel agents. Therefore, as long as the consumer is not held captive, the CRS vendor must compete with other CRS vendors. In this case, there is no evidence that consumers are held captive by travel agents.

Defendants' theory accurately shows that American is constrained by the existence of competing CRSs. However, the question is not whether there is any form of constraint, but whether American is precluded from charging monopoly prices. While entry barriers exist and impose additional costs for entering the market, the difficult factual question is whether the barriers are high enough to allow monopoly pricing. American may be able to extract booking fees high enough to slow the growth of their airline competitors, but low enough to make participation in the system cost efficient for the carrier. See, *United Airlines v. C.A.B.*, 766 F.2d at 1114. The test for monopoly pricing is not whether participation in the system is cost efficient for the carrier (it must be, otherwise the carrier would not participate), but whether the price is significantly higher than the seller's marginal cost. The existence of entry barriers for access to SABRE agents creates a material issue of fact as to whether other CRSs are effective substitutes for access to SABRE.

The evidence, interpreted in a light most favorable to plaintiff, could permit a reasonable jury to conclude that SABRE is a separate service market because there is evidence that airlines view each CRS as offering a unique service: access to a particular set of travel agents. A reasonable jury may conclude from the

evidence that SABRE automated agents are locked into SABRE (through contractual provisions) and that American is free to extract supracompetitive booking fees from participating airlines, although the fees are not high enough to justify abandoning the system. Thus, defendants are able to set booking fees at a supracompetitive rate, and consumers will not abandon SABRE agents because the travel agency's services are not effected since supracompetitive prices are high enough to slow an airlines growth, but low enough to remain economically cost-efficient for the airlines.

B. Elements of Monopolization

The elements of monopolization under section 2 of the Sherman Act are (1) possession of monopoly power in a relevant market; (2) wilful acquisition or maintenance ("use") of that power; and (3) casual antitrust injury. *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (citations omitted).

1. Monopoly Power

Monopoly power focuses generally on a firm's ability to "control prices or exclude competition." *Oahu*, 838 F.2d at 366 (citations omitted). Courts have employed the following evidentiary methods in order to determine whether a defendant has market power in the relevant market; proof that defendant accounts for a high percentage of total firm sales within the market ("market share"), defendant's actual exercise of price leadership control over the industry, affirmative actions taken by defendant that has excluded actual or potential competitors, profit levels, barriers to competition in the industry that would thwart new entry at the expansion of existing competitors, and historical trends within the industry. Holmes, *supra*, at 148-49.

Inquiries in this area often depend heavily upon market share and barriers to entry. *Oahu*, 838 F.2d at 366. "A firm with a high market share may be able to exert market power in the short run, but '[s]ubstantial market power can persist only if there are significant and continuing barriers to entry.'" *Id.* (quoting, 2 P. Areeda & D. Turner, *Antitrust Law*, at section 505). A high

market share will not raise an inference of market power in a market with low entry barriers or other evidence of defendant's inability to control prices or exclude competitors. *Oahu*, 838 F.2d at 366. "By the same token, '[a] declining market share may reflect an absence of market power, but it does not foreclose a finding of such power.'" *Id.* (quoting, *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496 n.18 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978)).

Market share is used as a surrogate for information which, if available, would provide a more accurate assessment of a firm's market power. Thus, if a firm's market elasticities (supply and demand) could be shown directly, there would be no need for extrapolating market power from market share. Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 938, 953 (1981). If a firm's marginal cost could be ascertained, its exercise of market power would be revealed merely by subtracting the price actually charged from the marginal cost of production. *Id.* These figures, however, are notoriously difficult (if not impossible) to determine. Therefore, courts look to market share in a relevant market as an effective surrogate for direct measurement of market power. P. Areeda & D. Turner, section 507, at 330-31.

If the relevant market may be access to SABRE agents, then defendant controls 100% of the market, and included in the determination of "relevant market" is a finding that other CRSs may not be effective substitutes for SABRE. Thus, there is a material issue of fact as to whether SABRE has market power because there is a material issue as to whether access to SABRE automated agents is a relevant market.

If the relevant market is the national CRS market, then plaintiffs must show that American has market power despite its relatively small share of the market. SABRE's share of Computerized Reservation Terminals has never exceeded 44.2%, and

it appears to be declining.[11] Plaintiffs argue, however, that the market share figures do not accurately represent American's market power. Thus, plaintiffs point to the actual exercise of market power as evidence of American's monopoly power.

Evidence of Market Power

First of all, there is direct evidence of the defendants' exercise of monopoly power in the CRS market. The recent Department of Transportation Report shows that defendants price booking fees above marginal cost. The report indicates that SABRE's booking fees equal 233 percent of their average costs for producing reservations during 1986, and Apollo's booking fee constitutes 192 percent of its costs for producing reservations. These results, however, do not mandate a finding of market power, as a matter of law, because the Report itself details the complications in allocating costs between booking transactions and supporting agency subscribers. Nevertheless, these factual findings preclude the court from finding, as a matter of law, that defendants do not have market power in the CRS market.

Plaintiffs also point to evidence that American engaged in price discrimination prior to the enactment of the 1984 CAB rules.[12] Price discrimination is "a term that economists use to describe the practice of selling the same product to different customers at different prices even though the cost of sale is the same to each of them." R. Posner, *Antitrust Law*, 63 (1976). Price discrimination in sales of the same product can not last long in a competitive market because other sellers of the same product

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11 CRS Vendors' Shares of CRTs

Year	SABRE	Apollo	SystemOne	Pars	DATAS II	Total
1980	42.0%	40.6%	0%	17.4%	0%	100%
1981	44.1	39.8	.4	15.6	0	100
1982	44.2	36.5	3.9	14.4	.9	100
1983	40.9	32.6	7.3	14.8	4.4	100
1984	40.3	30.3	9.0	13.7	6.6	100
1985	39.7	29.8	11.0	12.2	7.4	100

12 The CAB rules require uniform booking rates.

have an incentive to sell the product at a competitive rate to the victims of price discrimination. R. Posner, *Antitrust Law*, at 63 ("persistent price discrimination is very good evidence of monopoly because it is inconsistent with a competitive market"). Therefore, price discrimination usually can not occur in a competitive market for very long. P. Areeda & D. Turner, section 513, at 341-42; *Coal Exporters Ass'n of the United States, Inc. v. United States*, 745 F.2d 76, 91 (D.C. Cir. 1984), *cert. denied*, 397 U.S. 907, 105 S.Ct. 2151, 85 L.Ed.2d 507 (1985) ("it is well established that the ability of a firm to price discriminate is an indicator of significant monopoly power").

There is evidence that American engaged in price discrimination. For example, Eastern Airlines became a co-host on SABRE in March 1981, at a fee of 24 cents per booking. Delta Airlines, which competed with American at the Dallas/Ft. Worth hub, became a participating carrier on SABRE in October 1982 only after agreeing to a fee of $1.32. New York Air agreed to pay a $2.00 booking fee in December 1981.

The issue in both the market definition and monopoly power area is whether American is constrained from charging monopoly prices by the existence of alternative distribution channels. The ability to engage in price discrimination is an indication that American has market power. Whether the degree of market power rises to the level of monopoly power, however, is a detailed factual question which involves a weighing of the evidence. In response to charges of price discrimination, American argues that different prices were the result of individually negotiated contracts where some airlines had more bargaining power based upon the benefits to American created by their participation in SABRE.

In this case, evidence of price discrimination is not a compelling indication of market power. In a typical case of price discrimination, the value of the product in issue is not effected by the purchase of the product. That is, the fact that Buyer purchases a widget does not increase the value of the widget such that the market value of the widget increases *because* of the purchase by the particular Buyer. However, the value of SABRE is enhanced by each subscriber because the number of subscribers directly

increases the market value of the product to travel agents, and consequently, to other airlines. In effect, a major airline gives American something of value *merely by subscribing* to SABRE. A lesser airline's participation does not increase the value of the CRS as much because that flight information is not as valuable to the CRS. Therefore, the subscription price does not reflect American's entire compensation for providing SABRE services to its subscriber.

The evidence shows that Eastern became a co-host at a fee of 24 cents per booking in March 1981. SABRE's booking fee increased, so that New York Air was charged a $2.00 booking fee in December 1981, and Delta was charged $1.32 per booking in October 1982. However, neither New York Air nor Delta became "co-hosts", and their participation began after SABRE had established itself in the market. In 1981 and 1982 the CRS market was just establishing itself, and PARS was really the only other CRS, aside from Apollo and SABRE, in the market.[13] Above cost pricing and price discrimination is expected at this stage of market development. If the pricing was in fact supra-competitive it would serve to attract new entrants into the market. In fact, such new entry did take place when DATAS II and SystemOne entered the market and began to chip away at SABRE's and Apollo's market shares.[14]

Defendant's exercise of price discrimination supports plaintiffs' allegation that defendant had market power, although under the circumstances it is not compelling. A reasonable jury could conclude that defendant's exercise of price discrimination was indicative of market power, however, a reasonable jury could also come to the opposite conclusion.

Finally, whether the relevant market is deemed to be the market for access to SABRE automated travel agents, or the

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13 SystemOne was just beginning in 1981, and DATAS II began in 1982.

14 Apollo's market share has dropped approximately 10% since SystemOne and DATAS II entered the market. SABRE has fallen from a high water mark of 44.2% in 1982 to 39.7 in 1985.

market for access to CRS automated travel agents, plaintiffs have presented evidence indicating that competing CRSs may not be effective substitutes for SABRE. Thus, the discussion relating to whether SABRE is a distinct service market also supports plaintiffs' argument that defendants have monopoly power in the CRS market. The evidence indicates that the other CRSs may not constrain SABRE since the other CRSs are not substitutes for SABRE. Although not compelling, the evidence precludes a finding that defendants do not have monopoly power as a matter of law.

2. Wilful Acquisition or Maintenance of that Power

The second element of monopolization under section 2 of the Sherman Act is "the wilful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct 1698, 1704, 16 L.Ed.2d 778 (1966); *Oahu*, 838 F.2d at 367-68. The question of whether conduct is anticompetitive is a question of law. *Oahu*, 838 F.2d at 368 (reversing judgment against defendant monopolist on the ground that conduct was not anticompetitive as a matter of law).

Section 2 of the Sherman Act does not prohibit "monopoly" itself ("monopoly in the concrete"), *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911); rather, it prohibits conduct directed at "smothering competition." *Berkey Photo, Inc. v. Eastman Kodak, Inc.*, 603 F.2d 263, 275 (2d Cir. 1979). Conduct which may not be unlawful in itself may be illegal when done by a monopolist because it tends to destroy competition. *Lorain Journal & Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951).

Plaintiffs contend that American engaged in predatory pricing through which it attained its monopoly power. "Predatory pricing" refers to a firm's attempt to drive a competitor out of business, or to discourage a potential competitor from entering the market, by selling its output at an artificially low price. The theory is that once the rival has been dispatched from the market,

the predator will be able to reap monopoly profits which will more than pay for the losses incurred during the predatory period. Price reductions that constitute a legitimate, "competitive response" to market conditions are competitive, not predatory. *William Inglis and Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982). "Pricing is predatory only where the firm forgoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits . . ." *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir.1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

While the Ninth Circuit has adopted the Areeda-Turner theory, it has also modified the test. *Inglis*, 668 F.2d at 1032 (citing cases). The general rule is that a price should be considered predatory "if its anticipated benefits depend on its tendency to eliminate competition." *Inglis*, 668 F.2d at 1034. If the justification for a price reduction *did not depend upon this anticipated effect*, then it does not support a claim of illegal monopolization or attempted monopolization. Predatory pricing may be proven, without reference to evidence of subjective intent, by examining the relationship between the defendant's prices and costs. "But such proof must tend to show that the anticipated benefits of the prices, at the time they were set, depended on their anticipated destructive effect upon competition and the consequent enhanced market position of the defendant." *Inglis*, 668 F.2d at 1034.[15] Ultimately, "cost-based" inquiries serve merely as "an aid in determining the ultimate question: Did the justification for the defendant's price depend upon its anticipated destructive effect on competition, or was the price justified as a reasonably calculated means of maximizing profits minimizing losses, or achieving some other legitimate end?" *Inglis*, 668 F.2d at 1038. However, the cost-based analysis establishes the burden

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15 The court noted that pricing that was not profit-maximizing in the short run may be legitimate, competitive behavior under this test if based upon long term considerations "as long as those do not include the anticipation of enhanced market power as a result of predation." *Inglis*, 668 F.2d at 1034 n.29.

of proof on the issue of predation: "If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors." *Inglis*, 668 F.2d at 1036. In this Circuit, therefore, all of the Areeda-Turner presumptions are rebuttable by a showing of predatory or nonpredatory purpose.

Continental claims that American engaged in predatory pricing in the following manner; (1) American provided SABRE services to other airlines for free, and (2) American provided SABRE to travel agents below cost.

In determining whether American was forgoing short-term profit in order to later reap monopoly profits, it is first necessary to examine the nature of SABRE. SABRE is a "joint" product which provides services to both travel agents and airlines. Thus, a determination that American was pricing below cost must account for American's cost allocation decisions.

The cost initially charged to travel agents was designed merely to recover the costs of automating the agent. However, Apollo and SABRE began cutting prices as they competed for access to travel agents. American also began by providing free SABRE services to other airlines in order to increase the value of SABRE to travel agents. This evidence indicates that American was pricing SABRE below its marginal costs in order to gain a foothold (or chokehold) in the market.

The next question is whether American engaged in below cost pricing so that it could later increase its prices and recoup lost profits. The evidence permits an inference that American provided free services to airlines and sold SABRE to travel agents below costs in order to allow penetration of the CRS market through which it could recoup its lost profits by engaging in display bias (and later, supracompetitive booking fees). It appears

that American decided to provide SABRE to travel agents at less than marginal cost, and planned on allocating to the participating airlines the bulk of its costs through display bias. However, it is clear that American provided SABRE services for free at its inception. A reasonable jury could infer that below cost pricing was taking place, and that it was undertaken for the purpose of later recouping lost profits through monopoly overcharges primarily through display bias. Therefore, there is a material issue of fact as to whether American engaged in anti-competitive conduct to attain or maintain its monopoly power.

Continental argues, as another ground for finding a factual issue as to anticompetitive conduct, that American's contracts with travel agents were meant to lock in SABRE subscribing agents through long term obligations and high liquidated damages provisions. American allegedly engaged in this type of behavior in order to lock in travel agents so that it would be free to increase display bias without seriously risking loss of subscribing travel agents. The contractual practices, in conjunction with the evidence of below cost pricing, permits an inference that American wilfully attempted to attain or maintain its monopoly power by tying up its participating travel agents.

Possibility of Wilful Acquisition or
Maintenance of Monopoly Power

Plaintiffs' theory is that SABRE is its own relevant market because competition in the air transportation market is so intense that no airline can afford to abandon a CRS system with a five or ten percent CRS market share. Defendant argues that this claim amounts to an admission that plaintiff cannot show that wilful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of a superior product, historical accident or business acumen.

There are two possible sources of defendants' market power. First, it is possible that all CRS vendors have market power due to vigorous competition in the air transportation market, which requires all airlines to be carried on each

significant CRS, and the non-existence of a market mechanism[16] which would make travel agents sensitive to costs incurred by participating airlines. If this is the source of market power, then there can be no antitrust liability under section two because market power was not caused by or maintained due to any anticompetitive conduct. In other words, defendants' market power is due solely to existing market conditions in the air transportation business and the costs associated with making travel agents dual-CRS capable. However, there is a second basis for the attainment of market power which is based upon SABRE's implementation of coercive contractual provisions which may have raised entry barriers and created, or allowed defendants to maintain, monopoly power. The entry barriers created by such contractual practices, in conjunction with the general market conditions in the air transportation industry, are alleged to have created defendants' monopoly power.

The evidence supporting plaintiffs' claim that SABRE is its own relevant market is that each CRS is a separate and distinct channel for distributing airline flight information to travel agents because it is inefficient for travel agents to have more than one system, American's contractual practices prevent travel agents from freely switching to competing CRSs, and the intensely competitive air transportation market precludes an airline from abandoning a system which effectively provides the sole source of access to a significant percentage of travel agents.

American's acquisition and maintenance of monopoly power was not inevitable under this theory. *If* SABRE automated travel agents were free to purchase CRS services from the most efficient purveyor of such services, then a particular airline would have the power to abandon SABRE and the SABRE automated agent would have an incentive to replace SABRE with a more valuable CRS. In this manner, American would be significantly constrained by the existence of other CRSs. However, plaintiffs

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16 The only mechanism for making the travel agents internalize the costs placed on participating airlines through booking fees is the extreme option which no airlines can afford under current market conditions: refusal to participate in the CRS.

complain that the onerous contractual provisions, in conjunction with alleged predatory pricing, have locked-in travel agents to SABRE and, in this manner, have effectively prevented normal market factors from functioning. This has the effect of reducing the power of participating airlines from negotiating competitive booking fees because their bark is not supported by any possible bite. If a particular airline abandons SABRE, the SABRE agents will not shift to another CRS because of the onerous contractual provisions. Thus, under plaintiffs' theory, onerous contractual provisions and predatory pricing have made possible a situation in which SABRE may be deemed to constitute its own market, or deemed to have market power in the CRS market.

3. Causal Antitrust Injury

An antitrust plaintiff must prove (1) injury causally linked to a violation of the antitrust laws, and (2) that the injury is of the "type" the antitrust laws were intended to prevent. *California Computer Prod. v. International Business Machines, Corp.*, 613 F.2d 727, 732 (9th Cir.1979) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)).

Causal Link to Antitrust Violation

The plaintiff's burden of proving a causal link between the antitrust violation and its injury is satisfied "by proof of *some* damage flowing from the antitrust violation." *California Computer Products*, 613 F.2d at 732 (citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969)).

There is evidence that defendants post-Rule booking fees were supracompetitive, and that bias diverted revenues constituted a monopoly overcharge. This represents a direct injury caused by monopoly power.

Antitrust Injury

The Supreme Court has held that not all forms of injury caused by antitrust violations are compensable. In *Brunswick*, the Court held that an antitrust plaintiff must show that it was injured by the anticompetitive consequences of the antitrust violation. *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697. Plaintiff must show that "the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since '[t]he antitrust laws . . . were enacted for "the protection of *competition* not *competitors*."'" *California Computer Prod.*, 613 F.2d at 732 (citations omitted).

Injury caused by supracompetitive pricing is the type of injury which the antitrust laws were intended to prohibit. In this case, the participating airlines are injured as consumers of CRS services by paying supracompetitive rates. A reasonable jury may conclude that defendants' wilful acquisition of monopoly power has permitted them to extract monopoly prices from airlines. Thus, plaintiffs are injured by the anticompetitive consequences of the antitrust violation.

IV. Monopolization Re: United

United has moved for summary judgment against plaintiffs' claims that it monopolized five alleged markets: (1) the national market for the provision of CRS services to travel agents and airlines; (2) local markets for the provision of CRS services to travel agents and airlines[17]; (3) that market for the provision of Apollo services to airlines; (4) that national air transportation market; and (5) various local air transportation markets.

Plaintiffs have provided no competent evidence supporting a claim that United monopolized the national air transportation market. Summary judgment is appropriate. See, *supra*, discussion of claim against American.

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17 American has also made a request for summary judgment on this claim.

Plaintiffs have also failed to provide evidence that United has monopolized various local air transportation markets, or that these are relevant markets. Summary judgment is appropriate.

Plaintiffs have produced evidence creating a factual issue as to whether United has monopolized the national market for the provision of CRS services to travel agents and airlines, or that United has monopolized the market for access to Apollo agents. This claim mirrors the claim against American, See above, and summary judgment is not appropriate.

Finally, plaintiffs claim that United has monopolized certain local markets for the provision of CRS services to travel agents and airlines. The threshold question is whether local CRS markets are relevant markets for antitrust purposes.

In order to prove monopolization, plaintiffs must show that defendants possess monopoly power in "a relevant market." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir.1987). Relevant market is a factual issue to be determined by the jury, so summary judgment is only appropriate where a reasonable jury could not find the alleged market to be a relevant market.

The commercial realities of the industry are the major factors in determining the relevant geographic market. *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir.1986). In *United States v. Grinnell Corp.*, 384 U.S. 563, 576, 86 S.Ct. 1698, 1706, 16 L.Ed.2d 778 (1966), defendant was accused of monopolizing the local market for the provision of home security services. The Court, however, rejected the argument that the relevant geographic market was local. While the court recognized that the activities of individual stations are local in that they patrol an area with a 25 mile radius, the record evidence "support[ed] the conclusion that the business of providing such a service is operated on a national level." Defendant engaged in national planning, was subject to inspection, certification and rate-making by national insurers, had a national schedule of prices, rates, and terms, although such rates could be varied to meet local conditions, and it dealt with multi-

state businesses on the basis of multistate contracts. *Id.* at 576, 86 S.Ct. at 1706.

Apollo is marketed nationwide and the service is uniform throughout the country. The evidence supporting a finding that the relevant geographic market is local is that Apollo's local market share is greater in certain local areas. Apollo's local dominance tracks areas in which United enjoys a significantly large local market share. The CAB found that there is "abundant evidence that, from the perspective of travel agents and air carrier purchasers, as well as the CRS suppliers, the area of effective competition is far narrower than nationwide." CAB Final Rule, In Lim.App. 766. However, the Department of Transportation Report indicates that between 1983 and 1986 "the vendors' market shares in large and medium hubs were far from static." DOT Report at 116. The statistics indicate that SystemOne and PARS made dramatic headway in the large and medium hubs. Thus, evidence of large market shares in certain hubs must be balanced by erosion of such market shares through competition.

Plaintiff has merely provided evidence indicating defendants have a large market share in a number of local markets. As United points out, the argument is akin to suggesting that if a plaintiff claims that the defendant sells 60% of the coffee pots in San Diego, the court should automatically assume with respect to coffee pots that San Diego constitutes a relevant geographical market. Evidence of market share, however, is only important after the relevant market has been defined. Plaintiffs have not presented evidence showing that competition in the CRS market is anything but national in scope. Therefore, the local markets are not relevant and summary judgment is appropriate.[18]

V. Attempted Monopolization

An attempted monopolization claim must show (1) specific intent to monopolize a relevant market, (2) predatory or anticompetitive conduct, and (3) a dangerous probability of success.

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18 American's motion for summary judgment is granted for the same reasons.

Catlin v. Washington Energy Co., 791 F.2d 1343, 1348 (9th Cir.1986).

A. Attempt to Monopolize Air Transportation Market

Summary judgment is appropriate because plaintiff has failed to present any evidence supporting the dangerous probability of success element. The air transportation market is intensely competitive and defendant's market share has never reached 12%. Judge Learned Hand's famous dictum is at least instructive: While over ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." Clearly, twelve or fourteen percent is not enough to create a dangerous probability of success.

B. Local Air Transportation Markets

The USAir plaintiffs have acknowledged that the national market is the only relevant air transportation market in this case. USAir Plaintiffs' Statement of the Case, Dec. 30, 1985 at 7 ("the air transportation market is national in scope . . ."); PSA's Brief in Opposition to American's Motion for Summary Judgment, April 22, 1985 at 3-4.

Continental, however, has identified four markets which they claim American has attempted to monopolize: (1) air transportation to and from Dallas/Ft. Worth; (2) air transportation between Chicago and Los Angeles ("LA"); (3) air transportation between LaGuardia Airport and Chicago; and (4) air transportation between LaGuardia and Detroit.

Elements of Attempted Monopolization

A claim for attempted monopolization under section two consists of three elements: (1) specific intent to control prices or destroy competition, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir.1987). "An

allegation of monopoly power is an explicit requirement of attempted monopolization *and may be an implicit requirement of attempted monopolization's third prong relating to dangerous probability of success.*" *Id.* However, the weight of authority in this circuit holds that dangerous probability of success can be inferred from proof of specific intent and anticompetitive conduct. *California Computer Prod.*, 613 F.2d at 737; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).

In *Lessig*, the court stated:

> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is "not in issue." . . . Section 2 prohibits attempts to monopolize "any part" of commerce, and a dominant position in the business of distributing petroleum products and TBA [tires, batteries, and automotive accessories] was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products.

Id. at 474-75. This sweeping language, however, has been cut back in recent years. Under the "modified *Lessig* doctrine", a showing of relevant market is required "in circumstances where the conduct of the attempted monopolizer is ambiguous or not clearly predatory." *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir.1983), *cert. denied*, 471 U.S. 1007, 105 S.Ct. 1874, 85 L.Ed.2d 166 (1985).

Continental has failed to present evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry. In fact, Continental's own expert (Franklin Fischer) has testified that a city pair cannot be a relevant market absent unusual circumstances, such as slot-constrained airports and the absence of a market for slots at those airports. Plaintiffs' expert Fischer has also stated that a city or hub cannot constitute a relevant market either. A hub is merely a place to change planes during air travel between two other cities. Airlines do not sell air transportation to hubs, rather they sell air

transportation between cities. A city is not a market because a "city" is merely a collection of many city pairs that include that city. Plaintiffs have failed to present any evidence supporting their claim that these hubs and city pairs constitute relevant markets.

Therefore, plaintiffs must show (1) specific intent to monopolize a hub or city pair, (2) predatory conduct or anticompetitive conduct directed to the accomplishment of that purpose, and (3) that defendant's conduct is not ambiguous and is clearly predatory. *Greyhound Computer v. I.B.M.*, 559 F.2d 488, 504 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); *Blanton*, 721 F.2d at 1214.

(1) To-From Dallas/Fort Worth

Plaintiffs have presented facts sufficient to support its contention that American attempted to monopolize the Dallas/Fort Worth (DFW) hub. In *United States v. American Airlines*, 743 F.2d 1114 (5th Cir.1984), *cert. dismissed*, 474 U.S. 1001, 106 S.Ct. 420, 88 L.Ed.2d 370 (1985), the court reversed the district court's dismissal of the government's action against American for attempted monopolization. The same facts alleged in that case are also presented in this action.

In February 1982, American and Braniff Airlines each had hubs at DFW. Together, American and Braniff had more than ninety percent of the passengers on non-stop flights between DFW and eight major cities, and more than seventy percent of all passengers between DFW and seven other cities. Overall, American and Braniff accounted for seventy-six percent of monthly enplanements at DFW. *United States v. American Airlines*, 743 F.2d at 1116. American and Braniff were "competing fiercely for passengers flying to, from and through DFW, by offering lower fares and better service." *Id.* In February of 1982, American's president Robert Crandall and Braniff's president Howard Putnam had a telephone conversation in which Crandall suggested that Braniff raise its fares:

Putnam: Do you have a suggestion for me?

> Crandall: Yes. I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning. Crandall also stated that, "We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business."

Id.

During this conversation, American's president provides evidence of both specific intent to monopolize DFW, and evidence of anticompetitive conduct. First, Crandall indicates that a competing airline (Delta) should be eliminated so as to reduce competition and enable both American and Braniff to raise their fares. Second, Crandall's price fixing solicitation is a textbook example of anticompetitive conduct.[19] Thus, there is evidence that American had a specific intent to monopolize the market and that it engaged in "clearly anticompetitive conduct." Since there is evidence of these two elements, there is no need for plaintiff to define a relevant market.

The final element is dangerous probability of success. Proof of a relevant market is not required in this Circuit whenever plaintiff can show both specific intent to monopolize and anticompetitive conduct in furtherance of that goal. Thus, "dangerous probability of success" does not require a showing that DFW is a relevant market. All plaintiff needs to show is that there is a dangerous probability that defendant will succeed in monopolizing DFW. There is competent evidence supporting plaintiffs' claim; (1) there were significant access restrictions at DFW in 1982; (2) American's market share rose from 30% to 63% during this period of time; and (3) three different airlines left the market during American's alleged anticompetitive conduct. On this basis, there appears to be a factual dispute as to whether American attempted to monopolize the DFW market.

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19 Price fixing is a per se violation of section 1 of the Sherman Act.

(2) LaGuardia Airport—Detroit

Plaintiff contends that American attempted to monopolize the LaGuardia/Detroit city pair market. Continental points to American's president's statement that American lost $4 million in four months in order to drive New York Air out of the LaGuardia/Detroit market so as to "send a message" to New York Air that if it ever dared to enter the LaGuardia/Chicago market American would destroy them.

The evidence shows that American, according to its president, engaged in below-cost pricing in order to exclude New York Air from the LaGuardia/Detroit market. This evidence satisfies Continental's burden as to the specific intent element.

The next question is whether defendant's conduct was "clearly predatory or anticompetitive." The only evidence of anticompetitive conduct is Crandall's statement that American lost $4 million dollars in the LaGuardia/Detroit market so as to send a message to New York Air that they would be destroyed if they entered the LaGuardia/Chicago market. This is circumstantial evidence that American engaged in predatory pricing. Such evidence is not enough to trigger an inference that American has a dangerous probability of success.

Plaintiff has made no showing that American has a dangerous probability of success. First of all, plaintiff has failed to show that either the LaGuardia/Detroit or LaGuardia/Chicago city pairs constitute relevant markets. Moreover, even if these city pairs are assumed to be relevant markets, plaintiff has failed to show that there is a dangerous probability of monopolizing these markets.

Continental merely points to evidence that New York Air was driven from the LaGuardia/Detroit market due to defendant's actions. Harm to a competitor, in itself, does not constitute a violation of the antitrust laws, and is not indicative of monopoly power. Even assuming that LaGuardia/Detroit is an independent market, plaintiff makes no showing that (1) American has a significant market share, and (2) that there are barriers to entering

the market. Without a showing of significant barriers to entry, plaintiff's characterization of defendant's conduct as predatory makes no economic sense.[20] Summary judgment is appropriate.

(3) LaGuardia/Chicago

The evidence supporting plaintiffs' claim that American has attempted to monopolize the LaGuardia/Chicago market is based upon the same evidence as the LaGuardia/Detroit claim. Similarly, plaintiffs have failed to show clearly predatory conduct in furtherance of its intent to monopolize the market, and plaintiffs have failed to show that the city pair is a relevant market. Finally, even if the city pair constitutes a relevant market, there is no factual basis supporting plaintiffs' inference that American engaged in predatory conduct. However, the allegation of predatory pricing makes no economic sense because there is no showing that American has a significant market share and that there are barriers to entry. Thus, summary judgment is appropriate.

(4) Chicago/Los Angeles

Plaintiff points to no evidence of specific intent to monopolize the Chicago/Los Angeles market. Plaintiff argues that intent to monopolize can be "inferred" from evidence of intent to monopolize the other markets. There is no legal support for such an inference.

As to predatory or anticompetitive conduct, plaintiff points to Continental's exit from the market. This evidence is also advanced in favor of the dangerous probability of success element.

Summary judgment should be granted in favor of American because plaintiff has failed to provide evidence sufficient to support a jury finding on any of the elements for attempted monopolization of the Chicago/Los Angeles market.

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20 Predatory pricing can only be effective when there are significant barriers to entry which enable a monopolist to recoup short term losses through monopoly profits reaped after exclusion of a competitor from the market.

C. Attempted Monopolization: UNITED AIRLINES

Continental claims that United has attempted to monopolize the following markets: (1) the national CRS market; (2) local CRS markets; (3) the national air transportation market; and (4) various local CRS markets[21]: (i) Denver hub, (ii) the north-south West Coast corridor, (iii) the Honolulu-Los Angeles, Chicago-Los Angeles, Chicago-LaGuardia and LaGuardia-Cleveland routes. Defendant moves for summary judgment as to all these allegations.

As a preliminary matter, Continental argues that the motion must be denied because defendant has failed to cite record evidence supporting its motion. However, a party seeking summary judgment need not negate its opponent's claims where the opponent carries the burden of proof, it need only show that there is no probative evidence to support the claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

1. National CRS Market

(i). *Specific Intent*

Specific intent to monopolize can be inferred from defendant's market power or predatory or anticompetitive conduct directed to accomplishing the unlawful purpose (monopolization). *California Computer Prod.*, 613 F.2d at 737. Since there is a material issue of fact as to whether Apollo has monopoly power in the CRS market, then specific intent to monopolize can be inferred from market power. (See, discussion of monopoly power). Similarly, specific intent can also be inferred from predatory or anticompetitive conduct. (See, below.)

(ii). *Predatory or Anticompetitive Conduct*

There is competent evidence supporting plaintiffs' claim that defendant engaged in predatory or anticompetitive conduct.

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21 American has made the same motion.

See, *supra*, discussion concerning Unlawful Maintenance or Acquisition of Monopoly Power.

(iii). *Dangerous Probability of Success*

Plaintiff's claim that United has a dangerous probability of success depends upon an inference based upon United's market power. If there is a factual dispute as to whether United has monopoly power in the national CRS market, then there is a material issue of fact as to whether it has a dangerous probability of success. Therefore, summary judgment must be denied.

2. Local CRS Markets

Defendant moves for summary judgment on Continental's claim that United attempted to monopolize certain local CRS markets. Plaintiff argues that summary judgment can not be granted because (1) plaintiff has presented evidence of anticompetitive conduct tending to exclude competitors from the market (predatory pricing in conjunction with contractual provisions), and (2) dangerous probability of success (defendant's market share in each allegedly relevant market). Finally, specific intent is inferable from either market power or exclusionary conduct.

However, plaintiff has the burden of establishing that local CRS markets are "relevant markets" if the conduct of the attempted monopolizer is ambiguous or not clearly predatory. In this case, United's conduct is ambiguous or not clearly predatory. Long term contracts serve the legitimate business purpose of enabling United to make the sizeable investment to automate travel agencies with Apollo equipment with confidence that the equipment would be in place long enough for United's costs to be recovered and earn a profit; liquidated damage provisions serve the purpose of providing certainty as to the amount of United's damages in case of an agent's breach of an Apollo contract; and the 95% rule assured that if United installed Apollo equipment in an agency location, it would be used to generate booking fee revenues for United.

Therefore, plaintiff must show that local CRS markets are relevant markets for antitrust purposes. The only evidence offered in support of local CRS markets is the testimony of a Continental officer (Lenza) who states that Apollo accounts for over 60% of all air travel "processed" in nine states and three metropolitan regions. Market share data, standing alone and unsupported by evidence of significant entry barriers, does not support a finding that local markets constitute relevant submarkets. Thus, plaintiff has failed to show that the local markets constitute relevant submarkets and summary judgment should be granted.[22]

3. Local Air Transportation Markets

Plaintiff claims that its damage study provides evidence that Continental was "excluded" from various local air transportation markets as a result of United's exercise of monopoly power in the overlying CRS market (or Apollo market). Thus, the damages claims are alleged to be cognizable under the theory of monopoly leveraging. (See, below). However, as a fallback position, Continental also claims that these market exclusion claims are also valid claims of attempted monopolization. United seeks summary judgment as to the attempted monopolization claims.

Plaintiff must show that local air transportation markets are "relevant" markets because the conduct of the alleged monopolizer is either ambiguous or not clearly predatory. *Blanton v. Mobil Oil Corp.*, 721 F.2d at 1214. (See, above section describing United's conduct as ambiguous).

The evidence submitted supports defendant's contention that the only relevant air transportation market is the national market. Continental's own expert (Fischer) supports this conclusion. (See, discussion of relevant air transportation market in section pertaining to American). Plaintiff has failed to provide evidence suggesting entry barriers such as slot limitations which would support the finding of a local market. Thus, summary judgment should be granted for failure to establish that local air

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22 American's motion for summary judgment should be granted for the same reasons.

transportation markets are relevant markets for antitrust purposes.

VI. Monopoly Leveraging Theory

The court has considered the internal elements under the theory of monopoly leveraging and has determining that plaintiffs have presented evidence sufficient to survive a motion for summary judgment. However, it does not appear that the monopoly leveraging theory is consistent with the requirements of Section 2 of the Sherman Act. On that basis, the court grants defendants' motion for summary judgment.

The monopoly leveraging theory of liability holds that it is an act of monopolization for a firm having monopoly power in one market to exploit that power as a "lever" to secure competitive advantages in a second market, irrespective of the degree of market power actually achieved by the defendant within the second market. "[T]he use of monopoly power in one market to gain a competitive advantage in another is a violation of Section 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

A. Monopoly Leveraging in the Ninth Circuit

"The existence and scope of monopoly leveraging as an independent basis for Section 2 liability in this [Circuit] is not clear." *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1346 (9th Cir.1986). The court in *Catlin* noted that the Ninth Circuit has yet to rule on the issue of whether monopoly leveraging is a separate Section 2 violation, with elements distinct from monopolization or attempted monopolization. The court stated it would be appropriate to reserve ruling on the issue until it was presented with a case which required a determination of the issue.

In *M.A.P. Oil Co. v. Texaco Inc.*, 691 F.2d 1303, 1305-06 (9th Cir. 1982) the court stated[23] that Section 2 prohibits the use of monopoly power in one market "to gain an unwarranted competitive advantage" in the leveraged market. In *Catlin*, the court emphasized the adjective "unwarranted" as limiting the rule. The court also cited *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed.2d 712 (1984), where the court held that "to constitute a valid claim under Section 2, the introduction of the product in a second market must involve 'some associated conduct which constitutes an *anticompetitive* abuse or leverage of monopoly power . . . rather than aggressive competition on the merits.'" *Catlin*, 791 F.2d at 1346 (emphasis added in *Catlin*.) This much is certain, the Ninth Circuit has *rejected* a "monopoly leveraging theory flatly prohibiting the use of lawfully acquired monopoly power in one market to gain any competitive advantage in another market, especially where there has been no attempt to monopolize in the second market and no abuse of monopoly power in the first." *Catlin*, 791 F.2d at 1346.[24]

B. Elements of Monopoly Leveraging

Monopoly leveraging in this Circuit is only cognizable (if ever) when defendant uses its monopoly power in one market to gain an "unwarranted" competitive advantage in the leveraged (second) market. *M.A.P.*, 691 F.2d at 1306. Thus, an impermissible "use" of monopoly power does not encompass benefits reaped in a second market through the efficient size, integration, and competitive advantages of a monopoly's broad based activity. *Catlin*, 791 F.2d at 1346 (citing *Berkey Photo*, 603 F.2d at 276).

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23 This statement was dictum because the court did not base its decision upon a theory of monopoly leveraging. As stated by the court in *Catlin*, the Ninth Circuit has "not held that monopoly leveraging is a separate Section 2 violation with elements of proof distinct from monopolization or attempted monopolization." *Id.* at 1346.

24 The court noted that it questioned whether *Berkey Photo* prohibits such leveraging.

The following elements must be established: (1) the activity complained of must "entail an abuse of monopoly power itself, as opposed to the mere use of competitive advantages which the defendant enjoys for some reasons distinct from its power to set prices or exclude competition from the first market", *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F.Supp. 1504, 1517 (E.D.Cal.1983); *Catlin*, 791 F.2d at 1346; (2) the advantage sought in the second market must be "unwarranted", *Grason*, 571 F.Supp. at 1517-18; *Catlin*, 791 F.2d at 1346; and (3) plaintiff must define "both the market in which monopoly power is allegedly held, and the separate markets in which the leveraging of that power has allegedly taken place." *Grason*, 571 F.Supp. at 1518 (citing *M.A.P.*, 691 F.2d at 1305-08).

1. Use of "Monopoly" Power

The activity complained of must entail an abuse of monopoly power itself, as opposed to the mere use of competitive advantages which the defendant enjoys for some reasons distinct from its power to set prices or exclude competition. *Catlin*, 791 F.2d at 1346.

Display biasing can be accomplished by any firm which is vertically integrated in both the CRS and the air transportation markets. Biasing has been used since the inception of the CRS. Thus, display biasing does not appear to be an abuse of "monopoly power" since the activity does not depend upon defendant's power to set prices or exclude competition.

However, the economic feasibility of biasing, and the degree of bias in the system are functions of defendant's power in the overlying market. For example, if the CRS market is highly competitive then a substantial degree of bias would not be possible due to competitive conditions in the market. Biasing can be thought of as part of the "cost" of the system, and travel agents would be unwilling to tolerate substantial display bias in a competitive CRS market. If defendant has monopoly power in the CRS market then it will have the power to engage in substantial display bias. Therefore significant display bias is dependent upon the exercise of monopoly power. There is evidence that defendant

engaged in a significant degree of biasing, and that the degree of bias increased over time until the 1984 CAB rules were enacted.

2. Unwarranted Advantage in the Second Market

The Ninth Circuit has held that the competitive advantage sought in the second market must be "unwarranted," not merely the seeking of competitive advantage in another market. *M.A.P.*, 691 F.2d at 1305-06; *Catlin*, 791 F.2d at 1346.

In *Grason*, Judge Karlton reasoned that "unwarranted" should be interpreted in light of existing antitrust learning pertaining to "willful acquisition or maintenance" of monopoly power under Section 2. *Grason*, 571 F.Supp. 1518.

The Ninth Circuit has repeatedly held that

> "in determining whether a defendant's conduct constitutes the willful acquisition or maintenance of monopoly power required for the offense of monopolization, 'the test is whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition.'"

Id. at 1518 (quoting, *Transamerican Computer Co. v. IBM Corp*, 698 F.2d 1377, 1382 n. 2 (9th Cir.1983), quoting *California Computer Prod.*, 613 F.2d at 735-36).[25]

Display biasing is unreasonably restrictive of competition in that it restricts competition on the merits in the air transportation business. When consumers attempt to purchase a ticket on the best available flight their final decision is not solely based upon the merits of the particular flight (flight time, price, service, etc.). Rather, biasing artificially inflates the value of the host airline's flights by listing their flights above better flights. The consumer bears the brunt of this practice by getting a less than optimal flight, and the airline with the better flight has lost a sale

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25 The "reasonableness standard under section 2 is the same as that traditionally applied in section 1 litigation." *Transamerican*, 698 F.2d at 1382-83 n.2.

it should have otherwise made. This type of competitive advantage depends upon the perpetration of a fraud upon the consumer. It is unreasonable and therefore an unwarranted competitive advantage because it inhibits competition on the merits.

3. Defining the Relevant Markets

In this case there is no dispute that the national CRS market and the national air transportation market are distinct markets for antitrust purposes.

C. Danger of Monopolization as Limitation on Section 2 Claims

In *Copperweld*, the Court said that "[t]he conduct of a single firm is governed by section 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Copperweld*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.1985), *cert. denied*, 475 U.S. 1087, 106 S.Ct. 1471, 89 L.Ed.2d 727 (1986).

Under the above stated elements for monopoly leveraging a single firm may be deemed to have violated the antitrust laws for seeking an "unwarranted" competitive advantage in the second market. This permits a court to impose liability on a single firm where that firm's conduct does not threaten actual monopolization. If "unwarranted" is interpreted to require danger of monopolizing the second market, then the concept of monopoly leveraging merges into attempted monopolization.[26] Thus, the

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26 If "threat of monopolization" is an element to monopoly leveraging then the offense merges with attempted monopolization. In order to show attempted monopolization, plaintiff must prove specific intent to monopolize, predatory or anticompetitive conduct, and dangerous probability of success. Specific intent can be inferred from either the second or third element. Therefore, plaintiff need show only anticompetitive or predatory conduct and dangerous probability of successful monopolization. Under monopoly leveraging, if "unwarranted" is deemed to include the "threat of monopolization" as part of the

unilateral conduct of a firm is deemed to violate section 2, pursuant to the theory of monopoly leveraging, despite the fact that its conduct may pose no threat of monopolization in the second market, and its possession and maintenance of monopoly power in the primary market is lawful.

The Supreme Court has stated:

> In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. *Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.*

Copperweld, 104 S.Ct. at 2740; *Drinkwine*, 780 F.2d at 740. Yet, under the monopoly leveraging theory a firm may be deemed liable merely upon a showing that its conduct was unreasonably restrictive of competition.

First of all, the theory is inconsistent with *Copperweld*'s reading of the section 2 requirement that a monopolist's action must threaten monopolization. Second, the monopoly leveraging theory appears to be unnecessarily restrictive. Monopoly leveraging is prohibited because "a firm may not use its market position as a lever to create a monopoly in another market." *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1231 n. 42 (9th Cir.1982). The social evil at issue, creation of a monopoly in another market, is controlled adequately under the theory of attempted monopolization. Pursuant to that theory, a firm may be deemed liable when it engages in predatory or anticompetitive conduct[27] *and*

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term then all cases of monopoly leveraging would be cognizable under the doctrine of attempted monopolization. The "anticompetitive or predatory conduct" element is analogous to the "abuse of monopoly power" element, and the dangerous probability of success element would be substantially similar to the "unwarranted competitive advantage" element.

27 The element is analogous to the "abuse of monopoly power" element under the monopoly leveraging theory.

when there is a dangerous probability of successful monopolization.[28] Monopoly leveraging is overly restrictive because it attacks unilateral conduct which does not threaten monopolization. The danger is that such scrutiny will inhibit vertically integrated firms from vigorously competing in complementary markets.[29] While halting a monopolist's advances in their incipiency may represent a rational policy decision, it appears to be the a policy precluded by the language of section 2, as well as the purpose of the statute as interpreted in *Copperweld*.

Therefore, summary judgment on the monopoly leveraging claim would be appropriate because the theory is inconsistent with the requirements of section 2, and there is no good reason to expand liability under section 2 when the primary social evil attacked by the doctrine can be controlled through the traditional offense of attempted monopolization.

VII. Travel Agent Conspiracy

Defendant United has moved for summary judgment on Continental's claim that the same conduct which they alleged to have constituted monopolization and attempted monopolization also amounts to violations of the anti-conspiracy provisions of section 1 of the Sherman Act. The basis of this claim is that United's actions were taken pursuant to contracts between United and the Apollo travel agents.

Defendant has failed to present any evidence indicating that United's actions were anything but unilateral. A contract between United and its Apollo subscribers does not constitute a violation

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28 The specific intent element is inferred from predatory or anticompetitive conduct or market power.

29 Plaintiffs claim that *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948), and *Otter Tail Power Company v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed.2d 359 (1973), support the monopoly leveraging theory. However, in both *Griffith* and *Otter Tail*, the defendant's conduct violated the "attempt to monopolize" clause of section 2. While there is language in *Griffith* which suggests that leveraging without a dangerous probability of monopolization may support a claim for section 2 liability, the court was not called upon to make such a determination.

of section 1 where the contract merely provides the terms upon which the parties will deal with one another during the course of the relationship. *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir.1986).

Continental has not opposed this motion, and the motion was explicitly indicated in United's Notion of Motion. Summary judgment is appropriate.

IT IS THEREFORE ORDERED that:

(1) Defendants' Motion for Summary Judgment on plaintiffs' Section 2 claim based upon Essential Facilities Doctrine is GRANTED;

(2) Defendants' Motion for Summary Judgment re: monopolization and attempted monopolization of CRS market and SABRE/Apollo market is DENIED;

(3) Continental's Motion for Summary Adjudication re: Market Power is DENIED;

(4) United's Motion for Summary Judgment re: monopolization of national air transportation market, various local air transportation markets and certain local CRS markets, and American's motion re: certain local CRS markets, are GRANTED;

(5) American's Motion for Summary Judgment re: attempted monopolization of the following markets; national air transportation market, LaGuardia-Detroit, LaGuardia-Chicago, and Chicago-Los Angeles is GRANTED;

(6) American's Motion for Summary Judgment re: attempted monopolization of Dallas/Ft. Worth market is DENIED;

(7) United's Motion for Summary Judgment re: attempted monopolization of the national CRS market is DENIED;

(8) United's Motion for Summary Judgment re: attempted monopolization of Local CRS markets and Local Air Transportation markets, and American's motion re: local CRS markets, are GRANTED;

(9) Defendants' Motion for Summary Judgment on plaintiffs' Monopoly Leveraging Theory is GRANTED;

(10) United's Motion for Summary Judgment on Continental's claim for travel agent conspiracy is GRANTED.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 2 of the Sherman Act, as amended, (15 U.S.C. § 2) provides:

MONOPOLIZING TRADE A FELONY; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

14 C.F.R. § 255 provides:

PART 255—CARRIER-OWNED COMPUTER RESERVATION SYSTEMS

§ 255.1 Purpose.

(a) The purpose of this part is to set forth requirements for operation by air carriers of computer reservation systems used by subscribers so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation.

(b) Nothing in this part operates to exempt any person from the operation of the antitrust laws set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).

§ 255.2 Applicability.

This rule applies to air carriers and foreign air carriers that own, control or operate computerized reservations systems for subscribers in the United States, and the sale in the United States of interstate, overseas, and foreign passenger air transportation through such systems.

§ 255.3 Definitions.

"Affiliate" means any person owned by, controlled by, or under common control with a carrier.

"Availability" means information provided in display with respect to the seats a carrier holds out as available for sale on a particular flight.

"Carrier" means any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 1301(3), 49 U.S.C. 1301(22), and 14 CFR 298.2(f), respectively that are engaged directly in the operation of aircraft in passenger air transportation.

"Discriminate", "discrimination," and "discriminatory" mean, respectively, to discriminate unjustly, unjust discrimination, and unjustly discriminatory.

"Display" means the system's presentation of carrier schedules, fares, rules or availability to a subscriber by means of a computer terminal.

"On-time performance code" means a single-character code supplied by a carrier to the vendor in accordance with the provisions of 14 CFR Part 234 that reflects the monthly on-time performance history of a non-stop flight or one-stop or multi-stop single plan operation held out by the carrier in a CRS.

"Participating carrier" means a carrier that has an agreement with a system vendor for display of its flight schedules, fares, or seat availability, or for the making of reservations or issuance of tickets through a system.

"Primary display" means any display presented by a system vendor to comply with § 255.4.

"Service enhancement" means any product or service offered to subscribers or passengers in conjunction with a system other than the display of information on schedules, fares, rules, and availability, and the ability to make reservations or to issue tickets for air transportation.

"Subscriber" means a ticket agent, as defined in 49 U.S.C. 1301(40) of the Act, that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system.

"System" means a computerized airline reservation system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and that provides subscribers with the ability to make reservations and to issue tickets.

"System vendor" means a carrier or its affiliates that owns, controls or operates a system.

§ 255.4 Display of information.

(a) All systems shall provide a primary display or primary displays that include the schedules, fares, rules and availability of all carriers in accordance with the provisions of this section. Primary displays shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor.

(b) In ordering the information contained in a primary display, system vendors shall not use any factors directly or indirectly relating to carrier identity.

(1) System vendors may order the display of information on the basis of any service criteria that do not reflect carrier identity and that are consistently applied to all carriers, including the system vendor, and to all markets.

(2) System vendors shall provide to any person upon request the current criteria used in ordering flights for the primary displays and the weight given to each criterion.

(c) System vendors shall not use any factors directly or indirectly relating to carrier identity in constructing the primary displays of connecting flights.

(1) System vendors may select the connecting points to be used in the construction of connection flights for each city pair on the basis of any service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including the system vendor, and to all markets.

(2) System vendors may select connecting flights for inclusion ("edit") on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including the system vendor.

(3) System vendors shall provide to any person upon request current information on:

(i) All connecting points used for each market;

(ii) All criteria used to select connecting points;

(iii) All criteria used to "edit" connecting flights; and

(iv) The weight given to each criterion in paragraphs (c)(3)(ii) and (iii) of this section.

(4) If system vendors select connecting points for use in constructing connecting flights they shall use at least nine points for each city-pair, except that vendors may select fewer than nine such connecting points for a city-pair where:

(i) Fewer than nine connecting points meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The vendor has used all the points that meet those criteria, along with all additional connecting points requested by participating carriers.

(d) Upon request of information from any carrier, system vendors shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information.

(1) If a system vendor provides special loading capability to any other carrier, it shall offer the same capability to all

participating carriers in a non-discriminatory fashion as soon as technically feasible.

(2) Each system vendor shall provide to any person upon request all current data base update procedures and data formats.

(e) System vendors shall use or display information concerning on-time performance of flights only in accordance with the provisions of this part.

(1) Within 10 days after receiving the information from participating carriers or third parties, each vendor shall include in all primary schedule and availability displays the on-time performance code for each nonstop flight segment and one-stop or multi-stop single plane flight, for which a participating carrier provides a code.

(2) A system vendor shall not use on-time flight performance as a ranking factor in ordering information contained in a primary display.

(3) Except as otherwise specifically provided in this part, a system vendor shall not provide any information about on-time performance in a CRS on any air carrier or foreign air carrier unless that information is based on data reported to the Department. Any such information shall be displayed in an unbiased fashion and in the same manner for all participating carriers that report to the Department.

§ 255.5 Contracts with participating carriers.

(a) No system vendor shall discriminate among participating carriers in the fees for participation in its system, or for system related services. Differing fees to participating carriers for the same or similar levels of service shall be presumed to be discriminatory.

(b) No system vendor shall condition participation in its system on the purchase or sale of any other goods or services.

(c) System vendors shall provide upon request to carriers current information on their fee levels and fee arrangements with other participating carriers.

§ 255.6 Contracts with subscribers.

(a) No subscriber contract shall have a term in excess of five years.

(b) No system vendor shall directly or indirectly prohibit a subscriber from obtaining or using any other system.

(c) No system vendor shall require use of its system, by the subscriber in any sale of its air transportation services.

(d) No system vendor shall require that a travel agent use its system as a condition for the receipt of any commission for the sale of its air transportation services.

(e) No system vendor shall charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

§ 255.7 Service enhancements.

In the event that a system vendor offers a service enhancement to any participating carrier, it shall offer it to all participating carriers on non-discriminatory terms.

§ 255.8 Marketing Information.

(a) With the exception of marketing, booking, and sales data relating to the international operations of any carrier, each system vendor shall make available to all U.S. participating carriers on non-discriminatory terms all marketing, booking, and sales data relating to U.S. carriers that it elects to generate from its system.

(b) System vendors and participating carriers shall not release marketing, booking, and sales data they generate or receive relating to international operations of any carrier, absent authorization to do so by the carrier.

§ 255.9 Exceptions.

(a) The obligations of a system vendor under § 255.4 shall not apply with respect to a carrier that refuses to enter into a contract that complies with this part or fails to pay a non-discriminatory fee. A system vendor shall apply its policy concerning treatment of non-paying carriers on a uniform basis to all such carriers, and shall not receive payment from any carrier for system-related services unless such payments are made pursuant to a contract complying with this part.

(b) The obligations of a system vendor under this part shall not apply to any foreign air carrier that operates or whose affiliate operates an airline computer reservation system for travel agents outside the United States that does not display the flights of all United States carriers equally with the flights of the foreign carrier.

§ 255.10. Review and termination.

Unless extended, this rule shall terminate on November 30, 1991.

Supreme Court, U.S.
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No. 91-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALASKA AIRLINES, INC. AND
TRANSTAR AIRLINES CORPORATION,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF RESPONDENT UNITED AIR LINES, INC., IN OPPOSITION

ROBERTS B. OWEN
Counsel of Record

COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Attorneys for Respondent
United Air Lines, Inc.

March 16, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Does the owner of an innovative computer facility, which provides valuable services both to the owner's business and to competitors, violate Section 2 of the Sherman Act by charging its competitors (including plaintiffs) a service fee, even though plaintiffs have not offered to prove that the fee has adversely affected competition?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. United Air Lines, Inc., is a wholly-owned subsidiary of UAL, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1242

ALASKA AIRLINES, INC. AND
TRANSTAR AIRLINES CORPORATION,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

BRIEF OF RESPONDENT UNITED AIR LINES, INC., IN OPPOSITION

Respondent United Air Lines, Inc. (hereinafter "United") respectfully opposes the petition for a writ of certiorari. Although the petition characterizes the case as an opportunity for this Court to endorse two antitrust "doctrines" that allegedly arise under §2 of the Sherman Act (the "essential facilities doctrine" and "the monopoly leveraging doctrine"), for a series of reasons the case is not a proper vehicle for a decision as to the validity or scope of either doctrine: not only did petitioners fail to offer proof sufficient to state a claim under the legal theories they themselves espouse, but further prosecution of the claims is now blocked by procedural obstacles. Thus even if certiorari were granted, the Court would not be in a

position to resolve the issues the petition seeks to present.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, advanced two independent, alternative antitrust theories in the trial court. First, they alleged that United had lawfully established an "essential facility" (thereby acquiring lawful "monopoly power") but had violated the so-called "essential facilities doctrine" by charging petitioners a fee for access to the facility. Petitioners' alternative "fallback claim" (as they called it) was that the facility and the resulting "power" had been illegally established through unlawful contracting practices and that the access fees therefore represented unlawful monopoly prices.

The district court granted summary judgment against the first claim on the ground that the proffered proof failed to make a case under §2 of the Sherman Act. Petitioners then went to trial on the "fallback claim." After three months of trial the jury returned a verdict for United, finding specifically that United did not enjoy the "monopoly power" alleged. On appeal petitioners did not challenge the jury verdict; they challenged only the district court's summary judgment rulings, which the Ninth Circuit unanimously affirmed.

Factual Background

1. In 1976 United developed a new computerized reservation system or "CRS" (named "Apollo") which revolutionized the process by which travel agents make reservations on and write tickets for airlines. As petitioners emphasized below, "the efficiency of

the travel agency distribution system was dramatically improved" by Apollo and the other four CRS's subsequently developed and owned by other airlines (including American Airlines and Northwest Airlines); for participating airlines these systems generated tremendous volumes of automated "bookings" at a substantially lower cost-per-booking. Pet'rs' Sum. Jud. Br. at 14.

2. In Apollo's early days, as United was learning the CRS business, it provided CRS booking services to other airlines without charge, but as escalating costs made it necessary to develop revenue to finance Apollo's operations, United started to charge "booking fees." Initially contractual arrangements were made with a few airlines for a few cents per booking; as later arrangements were negotiated, higher fees were charged; and, as a result of this gradual historical evolution, by 1984 United was receiving varying Apollo "booking fees" from different airlines. In 1984, however, the Civil Aeronautics Board issued new "CRS regulations" governing the five CRS systems then in the field, and those regulations required, among other things, that every CRS vendor charge uniform prices to all participating carriers. *See* 14 C.F.R. §255.5(a) (1991). Thereupon United started charging all participating airlines a uniform booking fee of $1.85 per booking (lowering the fees for some airlines and raising them for others), an amount substantially below the non-CRS booking cost. Apollo's fee levels have never been challenged as violating the CRS regulations.

3. No airline has ever been refused access to Apollo; every airline that has wanted to participate in the system and that was willing to pay the booking fee

has been allowed to do so. At least one major airline decided that the CRS service was not worth the cost and has foregone CRS participation in favor of other distribution techniques. Specifically, Southwest Airlines, the only major airline to have been continuously profitable throughout the relevant period, has eschewed participation in Apollo and has grown steadily over the years.[1] The continued success of Southwest, now the parent of petitioner TranStar, makes clear that a strong competitive position can be maintained without participation in Apollo.

Procedural History

1. In 1984-85 a group of airlines including petitioners filed two separate CRS lawsuits, one against United and the other against American Airlines. (In the same period a separate group of plaintiffs, the so-called "Continental group," filed similar suits relying on somewhat different legal theories.) Today only two of the original plaintiffs remain in the field against United; they are petitioners Alaska Airlines, a successful carrier, and TranStar Airlines Corporation, which withdrew from the airline business many years ago.

2. In the period 1984-87 petitioners and other plaintiffs engaged in a massive discovery program, taking more than 300 depositions and processing millions of documents. Petitioners then elected to present their case on a legal theory that can be summarized as follows: (1) Apollo is capable, petitioners argue, of

[1] RT 11/21/89 at 23-29 (testimony of William J. Baumol). The petition's repeated assertions (at 4, 17) that no airline "could possibly afford" to operate without CRS participation are not reconcilable with the undisputed facts as to Southwest's success.

generating such large amounts of revenue for participating airlines that Apollo has become "an essential facility" to which airlines generally need to have access in order to compete in the airline business, thus conferring upon United lawful "monopoly power" over its airline competitors; (2) since United at one time charged different booking fees to different airlines, and because Apollo generates profits for United, it follows (say petitioners) that the fees they have been charged for access to Apollo have been "unreasonable and discriminatory;" and (3) it further follows, they say, that they should be entitled to recover from United *all* booking fees that they have ever paid to United, times three (for treble damages). Thus in the district court below these petitioners took the position that §2 of the Sherman Act prohibited United from charging any booking fee of any size to any airline.

3. Petitioners have explained their selection of the foregoing theory by saying that they considered it "simpler to prove" than alternative approaches.[2] Since they could afford under this approach to concede the lawfulness of Apollo's position in the CRS market,[3] they hoped to avoid the necessity of proving that United had developed Apollo's position through unlawful conduct.[4] Similarly, on their assumption that every penny of booking fees collected by Apollo was illegally collected and recoverable, petitioners avoided

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[2] *See* Pet'rs' Opening Appellate Br. at 18, n.23.

[3] *Id.* at 2 (United "acquired a lawful monopoly in the market for computerized reservation services . . .").

[4] Because petitioners' current theories do not depend on proof of illegality, the petition's discussion (at 4, 19) of allegedly illegal contracting practices is irrelevant here.

the necessity of assembling proof that the fees were competitively significant or had caused concrete competitive injury.[5] They never offered to show, for example, that if they had not incurred such booking fees, they would have purchased more airplanes or flown on more routes or carried more passengers or enjoyed a larger market share. Their grievance against the booking fees was framed in different terms, referring to price "discrimination" (until 1984) and the notion that "American and United have profitted [sic] handsomely from their exorbitant fees." Pet'rs' Sum. Jud. Br. at 60. The position was that an Apollo booking fee of any size was unlawful and recoverable, whether or not it had a concrete impact on competition.

4. The petition asserts, apparently as a matter of supposed "logic," that if United enjoys the power to charge any booking fee of any size, it necessarily enjoys the power to place competing airlines in "a price squeeze" and thus to "entirely eliminate competition among airlines." Pet. at 16-17, 19. No evidence to that effect was offered below. By the same token, it was conceded below that petitioners were not prepared to prove that United had either actually monopolized the airline business or attempted to do so. *See* App. 17a, 18a; Pet'rs' Opening Appellate Br. at 2; Reply Br. at 2.[6]

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[5] The petition's assertion (at 5) that a CRS practice called "screen bias" (a practice followed by all five CRS's until banned by the CAB in 1984) "diverted sales" from petitioners to United, thus causing competitive injury, is improper; no offer to prove such injury was made by these petitioners below.

[6] The implications in the petition (at 18-19) that petitioners offered to prove that respondents were "monopolizing or at-

5. Upon completion of discovery United moved for summary judgment against all pending claims, including petitioners' "essential facilities" claim and an independent "monopoly leveraging" claim being asserted by the Continental group of plaintiffs. In its motion United pointed out that petitioners "appear now to have abandoned" any monopoly leveraging claim. United's Main Sum. Jud. Br. at 63. Petitioners' 70-page brief in opposition relied exclusively upon their version of the essential facilities doctrine, made no mention of "monopoly leveraging," did not take issue with United's assertion that petitioners had abandoned any monopoly leveraging claim, and did not object to the entry of summary judgment against the latter. As noted *infra*, it is United's position that petitioners are now precluded from pursuing any monopoly leveraging claim here.[7]

6. The district court summarily dismissed petitioners' essential facilities claim on the basic ground that the essential facilities doctrine, rather than providing a basis for liability independent of §2, requires a showing of actual or attempted monopolization (here, of the air transportation market) and that petitioners had failed to offer such proof. App.

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tempting to monopolize the [air transportation] market" and that they enjoyed "the power to entirely eliminate competition among airlines" is inconsistent with petitioners' concessions below that they were not prepared to do so.

[7] In a footnote (App. 18a, n.15) the court of appeals asserted in effect that petitioners did not abandon or waive any monopoly leveraging theory, but, if certiorari is granted, United will demonstrate from the record that that factual conclusion is clearly erroneous. The court was demonstrably incorrect, for example, in asserting that petitioners' summary judgment brief "mentioned the monopoly leveraging doctrine." It did not.

37a-40a. For similar reasons the district court simultaneously rejected the Continental plaintiffs' monopoly leveraging claim. App. 70a.

7. Shorn of their essential facilities theory in the district court, petitioners elected to go to trial on their "fallback claim"—*i.e.*, that by the early 1980's Apollo had achieved "monopoly power" in the CRS business through improper contracting practices and that, when United then charged booking fees, it was exercising illegally-created-and-maintained monopoly power to extract unlawfully high monopoly prices. Pet'rs' Opening Appellate Br. at 19. After a full three-month jury trial,[8] the verdict was simply that United (and American) did not enjoy the monopoly power alleged. From that verdict petitioners did not appeal. Their post-trial appellate challenge was directed solely to the district court's pretrial summary judgment rulings, which were then affirmed by the court of appeals. App. 6a *et seq.*

8. In the court of appeals United argued *inter alia* that, because the jury had decided that United lacked the monopoly power that was the factual predicate of petitioners' essential facilities theory (as well as the predicate of the monopoly leveraging theory pressed by the Continental plaintiffs), petitioners were estopped by that unchallenged verdict from further proceeding with either their essential facilities theory or a monopoly leveraging theory. Although the court of appeals rejected the estoppel argument (App. 5a-6a), United adheres to its position.

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[8] Although petitioners had brought separate cases against United and American Airlines—and although the two lawsuits remain separate—the two were tried together (over United's objection) before a single jury.

REASONS FOR DENYING THE WRIT

Preliminarily, although petitioners imply that conditions in the relevant markets are "anticompetitive and harmful to consumers" and thus of vital current importance (Pet. at 2), the suggestion overlooks the fact that the practices of all CRS operators have been under continuous regulation by the CAB and its successor, the Department of Transportation, for the past seven years, thus providing the interests of competitors and consumers with all the protection that the regulators regard as appropriate. This is simply not a situation in which judicial intervention is needed to remedy on-going ills.

A. ESSENTIAL FACILITIES

1. Since the Result Reached Below Is Consistent with the "Essential Facilities" Decisions upon Which Petitioners Rely, There Is No Conflict with the Case Law in Other Circuits

The petition cites a total of seven "essential facilities cases" with which the holdings below are said to be in "clear conflict." Pet. at 10-12. The reasoning of the cited cases refutes the argument.

At the outset, there seems to be general basic agreement as to the "conventional" scope and content of the essential facilities doctrine as developed in the lower federal courts. In April 1991, when certiorari was sought in the *Conrail* case, *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991), this Court asked the Solicitor General for the Government's views, and the Solicitor General observed that a "four factor test is

conventionally applied" in determining whether the essential facilities doctrine gives rise to §2 liability:

> "(1) [C]ontrol of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[9]

The quotation comes from *MCI Communications* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.) (citations omitted), *cert. denied*, 464 U.S. 891 (1983), and it is worth noting that in the district court below petitioners' extensive brief in opposition to United's summary judgment motion relied heavily on (and indeed was structured around) exactly the same *MCI* factors. Pet'rs' Sum. Jud. Br. at 30; *see also* Pet'rs' Opening Appellate Br. at 27-28 and Reply Br. at 8, 13, and 14.

Petitioners' reliance upon the foregoing factors, including particularly factor (3), has plagued their position from the outset because it is factually undisputed that, so far as Apollo is concerned, there has never been any "denial of the use of the facility to a competitor." Moreover, turning to the seven essential facilities cases allegedly creating a "conflict," liability was found in only three,[10] and in each of the three the critical factor was an outright refusal to

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[9] "Brief for the United States as Amicus Curiae" in Consolidated Rail Corporation v. Delaware & Hudson Ry. Co., No. 90-380, October Term 1990 (cited hereinafter as the "*Conrail* brief") at 15, n.21.

[10] The three cases are (1) *Hecht* (Pet. at 10), (2) *Fishman* (*id.* at 11), and (3) *Otter Tail* (*id.* at 14).

deal on the part of the facility owner.[11] For example, the petition relies heavily upon this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), characterizing it (at 14) as an essential facilities case, but the "critical events" in that case were the defendant's flat refusals to deal. *See id.* at 371, 378. In short, the very cases upon which petitioners here rely establish that, if the outcome of this case is to be controlled by "conventional" doctrine, petitioners have no cause of action.

The same reasoning was employed by the court of appeals below. In concluding that petitioners had failed to state an essential facilities claim, the court referred directly to the four *MCI* factors quoted above and emphasized that, whereas an outright refusal to deal can give rise to liability, there had been no such refusal in this case:

> "Moreover, United and American have never refused any of the plaintiffs access to their respective CRSs. *See Otter Tail*, 410 U.S. at 378, 93 S. Ct. at 1030 (outright refusal); *MCI*, 708 F.2d at 1132 (same). Rather, United and American have always given all of their competitors in the air transportation

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[11] In one of the essential facilities case cited by petitioners, the *Conrail* case cited *supra* at 9, the Court of Appeals for the Second Circuit reversed summary judgment in favor of the defendant on the ground that an allegation that the facility owner had instituted a huge increase in the access fee (an increase that the plaintiff refused to accept) for the purpose of achieving a monopoly was sufficient to state a claim. Since the court evidently considered the alleged conduct to be tantamount to a refusal to deal, *Conrail* seems consistent with the other cases upon which petitioners rely.

> market such access for a fee. Neither United nor American have ever set this fee at a level that would drive their competitors away." App. 16a (footnote omitted).

Given the undisputed facts thus recited, the "conventional" principles to which petitioners themselves subscribe plainly called for rejection of petitioners' claim. Since the court of appeals thus acted in conformity with the teachings of petitioners' essential facilities authorities, the petition's suggested "conflict" simply does not exist. Although the court below also observed that petitioners had "concede[d]" that United was neither monopolizing nor attempting to monopolize "the downstream air transportation market" (*see* App. 17a-18a), thus fortifying the court's conclusion that United's conduct was "not actionable under Section 2" (*id.*), the latter observation was not essential to the court's decision to reject petitioners' essential facilities claim.[12]

Finally, note must be taken of the petition's reference to cases holding or implying that the essential facilities doctrine prohibits "anticompetitive behavior" that imposes a "severe handicap" upon the facility owner's competitors. Pet. at 10-12. The cases are without significance here for two reasons. First, the

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[12] Since the results reached in the essential facilities cases upon which petitioners rely are consistent with the dictum of the court of appeals, there is in fact no conflict between the positions, but even if there were a conflict, it would not militate in favor of certiorari: as noted in the classic treatise on this Court's practice, a mere inconsistency between dicta below and holdings elsewhere should not be considered "a real or 'intolerable' conflict" sufficient to warrant certiorari. Robert L. Stern, et al., *Supreme Court Practice* 196 (6th ed. 1986).

cited cases (particularly *Hecht* and *Twin Laboratories*) make clear that it is only where the "severe handicap" was the result of an outright refusal to deal (or "denial of access") that liability has been found; the language of the cases is perfectly explicit on the point.[13] Secondly, even if the case law could be read as prohibiting some other kind of severely handicapping or harmful conduct on the part of a facility owner, petitioners' essential facility claim would have to be rejected for failure to prove (or offer to prove) the existence of any kind of "severe handicap" within the ordinary meaning of that phrase.[14] As the *Twin Laboratories* opinion observed,

> "The existence of a facility, even if essential in a technical sense, does not constitute an antitrust violation if the plaintiff cannot allege harm to competition." 900 F.2d at 568.

Since petitioners never offered proof of a concrete handicap or harm to competition, the result reached below is completely consistent with the authorities upon which petitioners rely.

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[13] See Petition at 10, 11, quoting from *Hecht* (referring to a "denial of [the facility's] use inflict[ing] a severe handicap on potential market entrants") and from *Twin Laboratories* (same).

[14] To the extent that petitioners are concerned about a future "price squeeze" to "eliminate competition" (Pet. at 16-17), the answer is that petitioners have conceded (as noted by the court of appeals below) the absence of any dangerous probability that United will monopolize the airline business. App. 17a-18a.

2. The Courts Below Were Correct in Their View That an "Essential Facilities" Claimant Under §2 of the Sherman Act Must Offer To Prove Either Actual or Threatened Monopolization

Ignoring the fact that they have failed factually to state a case under the conventional essential facilities doctrine, petitioners contend that the courts below erred in their view that under that doctrine there can be no violation of the law (*i.e.*, of §2 of the Sherman Act) unless the facility owner used his facility "actually to monopolize or attempt to monopolize." Pet. at 10. In arguing for "less stringent tests," *id.*, petitioners are in effect contending that there can be antitrust liability even though the conduct involved does not violate the explicit proscriptions of §2.

The clarity of the error in petitioners' contention militates against a grant of certiorari. Insofar as unilateral conduct is concerned, the plain words of §2 compel the conclusion that either actual or attempted monopolization is a prerequisite to liability—a proposition made completely clear in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-68, 775-76 (1984). Moreover, the antitrust authorities of the U.S. Government disagree with petitioners' suggestion. In the 1991 *Conrail* brief cited above the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division pointed out that "[t]he 'essential facility' doctrine simply describes one form of conduct that may, in some circumstances, constitute monopolization or attempted monopolization" and flatly "disagree[d]" with the suggestion that the doctrine can give rise to liability in the absence of those basic §2 requirements.[15] In view of the clarity

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[15] *See Conrail* brief, *supra* n.9, at 16. In the same brief the

of the *Copperweld* opinion on the point, there is no need for the Court to revisit the subject now—particularly in a case where, as here, petitioners cannot even plead a denial of access of the kind required under even the most expansive view of the essential facilities doctrine.

B. MONOPOLY LEVERAGING

As previously noted, it was petitioners' position below that under the essential facilities doctrine the charging of *any* booking fee was illegal without regard to its competitive significance or insignificance. Apparently petitioners regarded this simple approach as obviating the need to invoke the "monopoly leveraging" theory, which would have required at least an affirmative showing that the Apollo booking fees placed them at a significant "competitive disadvantage." It is United's position here (a) that petitioners, thus motivated, clearly abandoned any monopoly leveraging claim and should not be given an opportunity to argue such a claim on the merits here, and (b) that even if no such abandonment had taken place, this record presents no monopoly leveraging issue deserving of certiorari review.

Government made clear its view that the essential facilities doctrine does not prohibit a facility owner from charging an access fee, even though it is a monopoly price, and thus transferring some amount of profit from the user to the owner ("it is not an antitrust offense for a lawful monopolist to charge a monopoly price") because any such prohibition "would reduce incentives to investment and innovation by siphoning off the rewards normally accruing to desirable behavior." *Id.* at 14, 16.

1. The "Monopoly Leveraging" Rulings Below Do Not Conflict with Any Cognizable Body of Law in Any Other Circuit

In the court of appeals below petitioners invoked the Second Circuit's 13-year old decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the first case to postulate the "monopoly leveraging" concept that where a defendant enjoying lawful monopoly power in Market A uses that power to gain "a competitive advantage" in Market B, it may be liable under §2 even though (1) the monopoly position is concededly lawful and (2) there has been no actual or threatened monopolization of the second market.[16] Having decided to allow petitioners to argue such a claim, the court of appeals "reject[ed] *Berkey's* monopoly leveraging doctrine as an independent theory of liability under Section 2" (App. 19a), thus creating an apparent conflict. The post-*Berkey* history, however, raises grave doubts as to whether the "doctrine" enjoys any continuing vitality. In such circumstances, United respectfully submits, the wisest course is to deny certiorari and wait to see whether a real "conflict" ever develops.

As to whether *Berkey* should be regarded as good law today, the D.C. Circuit has noted that in the early post-*Berkey* years the decision attracted considerable criticism. *Association for Intercollegiate Athletics for Women* v. *N.C.A.A.*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984). Also in 1984 this Court handed down its *Copperweld* decision making amply clear that, con-

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[16] In the summary judgment proceedings below petitioners never mentioned *Berkey*.

trary to *Berkey*, §2 liability cannot be found in the absence of either actual or attempted monopolization. Finally, in 1990 the Second Circuit itself went out of its way to characterize the *Berkey* monopoly leveraging theory as dictum. *Twin Labs., Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) (cited in the Petition at 11).

Moreover, although a "monopoly leveraging" approach would seem to have considerable attraction for treble damage plaintiffs (since it is presumably easier to establish "a competitive advantage" than actual or attempted monopolization), we are unaware of any post-*Berkey* case, either in the Second Circuit or elsewhere, that has actually imposed liability and damages on the basis of the *Berkey* rationale (*i.e.*, in the absence of any showing of actual or threatened monopolization of the second market). The petition (at 9) suggests that there are cases "following" *Berkey*, but in fact even the judicial decisions cited therein did not impose liability on that basis.

For example, in *Grand Light & Supply Co.* v. *Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir. 1985), a case characterized in the petition as "reaffirm[ing]" *Berkey* (Pet. at 9), the Second Circuit simply recited that the plaintiff in that case had invoked the *Berkey* theory but had failed to establish that the defendant enjoyed any "competitive advantage," leading to a simple affirmance of the district court's holding that there had been no violation of the federal antitrust laws. In the circumstances there was no need to consider the vitality of the *Berkey* reasoning.

In *Kerasotes Mich. Theatres* v. *National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub. nom. G.K.C. Michigan Theatres, Inc.* v.

National Amusements, Inc., 490 U.S. 1087 (1989), the plaintiff alleged that the defendant had used monopoly power in Market A either to monopolize or to attempt to monopolize Market B.[17] The defendant moved to dismiss under Rule 12(b)(6) for failure to state a claim; the district court granted the motion; and the Court of Appeals for the Sixth Circuit reversed, holding (as quoted in the petition at 9-10) that the plaintiff had stated a claim even though the defendant had not achieved "monopoly power or [a] dominant market position in that second market." As subsequently observed by the same court, the critical allegation in *Kerasotes* was the allegation that the defendant had sought to exclude competition. *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 917 F.2d 1413, 1426 (6th Cir. 1990), *cert. denied*, __U.S.__, 112 S. Ct. 51, 274, 116 L. Ed. 2d 29, 226 (1991). Thus the *Kerasotes* court's reinstatement of the plaintiff's claim was completely consistent with the view of the courts below that, where a plaintiff alleges and offers to prove an attempt to monopolize "the second market," he is entitled to proceed under §2 of the Sherman Act.

United acknowledges, of course, that the court of appeals read *Kerasotes* more broadly than we do and expressed the view that the decision is "in error" (App. 19a, n.16), thus giving rise to another apparent conflict. In view of *Langenderfer's* reading of *Kerasotes*, however, the Ninth Circuit in this case was expressing disagreement with a *Kerasotes* dictum

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[17] Although the allegation of attempted monopolization is not clearly reflected in the Sixth Circuit's opinion, it was included in the Complaint.

which apparently does not reflect the law in the Sixth Circuit. Thus no true conflict is involved.

In any event, this Court's authoritative reasoning in *Copperweld* and the Second Circuit's characterization of the *Berkey* approach as dictum (coupled with the apparent absence of cases imposing liability and damages on such a theory) raise substantial doubt that the *Berkey* theory will be treated as authoritative in the future. Until it is so treated, we submit, certiorari review would not be worth undertaking.

2. The Decisions Below Do Not Conflict with the Cited Decisions of This Court

In challenging the "monopoly leveraging" holding below the petition advances the entirely novel thesis that the antitrust laws employ two "different" "monopolization standards"—(1) the familiar standard set forth in §2, calling for proof of either actual or threatened monopolization, and (2) the different and lower "monopolization standard" allegedly articulated in *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), which cryptically referred to gaining "a competitive advantage." The suggestion is that in a two-market situation only the lower "*Griffith* standard" is "appropriate to the circumstances" and that in applying §2's "higher standard" here, the courts below acted inconsistently with *Griffith*. Pet. at 14-15.[18]

The short answer is that such an expansive reading of a single phrase from *Griffith* (in which the only

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[18] As part of its discussion of *Griffith* the petition also implies (at 14) some conflict with this Court's decision in *Otter Tail*, which it characterizes as an essential facilities case. As indicated above, however, since there was an outright refusal to deal in *Otter Tail*, there is no conflict here.

conduct actually condemned was concerted action of a kind bearing no relationship to the present case) is inconsistent with both the plain meaning of the words of §2 and this Court's thoughtful analysis of §2's role in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767, 775-76, 767-68 (1984). At least since *Copperweld* it has been generally understood that a single firm can be liable under §2 only where there is a showing of actual or threatened monopolization, and that understanding obviates the need for further elucidation of that principle now.[19]

3. Because Petitioners Did Not Offer To Prove a "Competitive Advantage," this Case Is Not the Appropriate Vehicle for Resolving the Validity of the Monopoly Leveraging Theory

The Government's 1991 *Conrail* brief refers to the "salutary principle" reflected in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), that "antitrust defendants should not be subjected to the formidable burdens and risks of trial on the basis

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[19] *See, e.g.*, Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986) (quoting *Copperweld* for the proposition that "the conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization"); Indiana Grocery, Inc. v. Super Valu Stores, 864 F.2d 1409, 1413 (7th Cir. 1989) ("Section 2 of the Sherman Act governs single-firm conduct only when it threatens actual monopolization"); Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 611-12 (6th Cir. 1990) (citing *Copperweld* for the proposition that "[u]nilateral conduct is governed by section 2 of the Sherman Act, . . . 'and is unlawful only when it threatens actual monopolization'"), *modified*, 927 F.2d 904, *cert. denied*, ___ U.S. ___, 112 S. Ct. 406, 116 L. Ed. 2d 355 (1991); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990) (same), *cert. denied*, ___ U.S. ___, 112 S. Ct. 51, 274, 116 L. Ed. 2d 29, 226 (1991).

of evidence that is insufficient to support a viable theory of antitrust liability." *Conrail* brief at 19. In this case petitioners' "evidence" is plainly insufficient to support a monopoly leveraging claim (even supposing that the *Berkey* principle is valid): petitioners simply did not offer to prove that Apollo's booking fees conferred any concrete, significant "competitive advantage" upon United vis-a-vis its competitors. That being so, United submits, a grant of certiorari could only lead to an affirmance, whatever the Court's view of the validity or invalidity of the monopoly leveraging theory. In short, the case does not present a suitable vehicle to decide that issue.

Moreover, even if it were possible to find some factual basis for concluding that Apollo's booking fees created a significant "competitive advantage" for United in the "downstream" air transportation market, the Court would not necessarily be in a position to decide the validity of the *Berkey* theory. This is because the "upstream market" context here is so different from that in *Berkey*. There the defendant was the sole firm in the "upstream market," enjoying classical monopoly power, whereas in this case the corresponding market (CRS) has been occupied by five different firms, all engaged in vigorous competition with one another. Whatever market power United may have enjoyed as a CRS market competitor, it was qualitatively different from the overall monopoly power enjoyed by the *Berkey* defendant as the sole "upstream market" participant. If this Court, having granted certiorari, were to decide that United's supposed "competitive advantage" did not violate §2 (because there was no actual or threatened monopolization), such a holding would leave open the

question whether a similar competitive advantage in the hands of a *Berkey*-type monopolist would violate the Act. Again, this case does not present a good vehicle for resolving the validity of the *Berkey* theory.

C. THE ALLEGED DEPRIVATION OF PETITIONERS' "RIGHT TO TRIAL"

The final four pages of the petition (16-19) suggest that the courts below improperly resolved certain "fact issues" against petitioners and thus "deprived [them] of their right to trial." Pet. at 16. Such fact-bound issues, of course, do not normally warrant review by this Court. In any event, the petition's discussion reflects at least some forgetfulness as to the positions taken by petitioners below.

(a) The petition implies (at 17) that in the courts below petitioners offered to prove that United, through Apollo, enjoyed the power to "eliminate competition in the air transportation market," but an offer of proof to that effect appears in none of the three relevant briefs filed in the courts below. Indeed, as previously explained, in the court below petitioners were proceeding on a theory designed to eliminate the difficulties of making such a case.

(b) Representing that it is "undisputed" that "no airline has [ever] withdrawn from any CRS," the petition asserts (at 17) that, if petitioners had been given the opportunity, their "evidence at trial would have shown . . . that withdrawal" from Apollo "would swiftly have destroyed any airline that tried it." In fact the existing record shows exactly the opposite.[20]

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[20] It is undisputed that Southwest Airlines "tried it" with great success.

Moreover, such "evidence" would not have established liability even under the case law upon which petitioners themselves rely, because petitioners did not offer to prove a refusal to deal, a "severe handicap," or a concrete "competitive advantage" resulting from Apollo's booking fees.

(c) The petition's complaints (at 18) about United's CRS contracting practices are irrelevant under both of the legal theories advanced here, both of which assume that United's position in the CRS market was achieved and maintained lawfully. *See supra* p. 5 and n.4.

(d) The petition asserts that the courts below "simply assum[ed]" that United "could not be monopolizing or attempting to monopolize the market," whereas (says the petition) "[p]etitioners came forward with evidence . . . that [United] had the power to eliminate competition among airlines." *Id.* at 19. The latter assertion is not only a misstatement of the record; it ignores petitioners' own concession that they could not show that United is in a position (or has attempted) to monopolize the airline business. *See supra* p. 6.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERTS B. OWEN
Counsel of Record

COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Attorneys for Respondent
United Air Lines, Inc.

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No. 91-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. COOPER*
J. EDD STEPP, JR.
STEVEN C. MCCRACKEN
MARK E. WEBER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Respondent
AMERICAN AIRLINES, INC.

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

This case involves the application of Section 2 of the Sherman Act, 15 U.S.C. §2, to the unilateral activity of a firm possessing *lawfully* acquired and maintained monopoly power in one market that allegedly gave that firm some competitive advantage, although not a monopoly or a threatened monopoly, in a second market. Respondent American Airlines, Inc. respectfully disagrees with Petitioner's statement of the questions presented by the application of Section 2 in such circumstances. Moreover, Petitioner fails to alert the Court to the fact that the undisputed material facts established in the trial court would preclude a finding for Petitioner even on the strained reading of Section 2 that Petitioner offers. Thus, Respondent would state the questions presented by this case as follows:

(1) Under this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), does a firm violate Section 2 of the Sherman Act if it allegedly uses a *lawfully* acquired and maintained "essential facility" or *lawfully* acquired and maintained monopoly power in one market to gain a competitive advantage in a second market, when the firm does not monopolize or attempt to monopolize the second market?

(2) Even if Section 2 could be violated without any showing of either actual or attempted monopolization, did the undisputed material facts support the entry of summary judgment in favor of Respondent because of Petitioner's failure to raise any triable issue with respect to the elements of Petitioner's "essential facility" and monopoly leveraging claims?

THE PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all parties. American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation.

The following are also subsidiaries or affiliates of AMR Corporation:

Air Services, Inc.
American Airlines Decision Technologies, Inc.
AA Capital
AMR Capital Corporation
AMR Commuter Finance,Inc.
AMR Commuter Finance II, Inc.
AMR Eagle, Inc.
AMR Information Services, Inc.
AMR Insurance Ltd. (Bermuda)
AMR Investment Services, Inc.
AMR Leasing Corporation
AMR Properties, Inc.
AMR Services Corporation
Avenue H Properties, Inc. (Texas)
Blue Sky Number One, Inc.
D/FW Terminal Corporation (49%)(Texas)
AMR/American Airlines Foundation (Texas)

The following are subsidiaries of American Airlines, Inc.:

AA Credit Corporation
AA Ventures I, Inc.
Admirals Club, Inc. (Mass.)
Air California, Inc.
AirCal, Inc.
Air Data Center, Inc.
American Airlines Australian Tours, Inc.
American Airlines de Italy, Inc.
American Airlines de Mexico, S.A. (Mexico)
American Airlines de Venezuela, S.A. (Venezuela)
American Airlines Fuel Corporation
American Airlines Overseas Finance, N.V. (Netherlands Antilles)

American Inter-Island, Inc.
AMR Ventures I, Inc.
AMR Ventures II, Inc.
AMR Ventures III, Inc.
AMR Ventures IV, Inc. (Nevada)
AMR Ventures Holding Company, Inc.
Flagship Hotels, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1242

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent American Airlines, Inc. ("American") respectfully submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Petitioner Northwest Airlines, Inc. ("Northwest" or "Petitioner").[1]

OPINIONS BELOW

American does not disagree with the citation to the opinions below contained in the Petition.

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[1] The Petition for a Writ of Certiorari involves two cases that were consolidated below. The first case involves Alaska Airlines, Inc. and Transtar Airlines Corporation as Petitioners, and United Air Lines, Inc., as Respondent. American is not a party to that action. The second case involves only Northwest as Petitioner and American as Respondent. American only responds to those arguments and contentions in the Petition for Certiorari that pertain to the claims asserted by Northwest against American.

STATEMENT OF JURISDICTION

American does not disagree with the statement of the basis for jurisdiction in this Court contained in the Petition.

STATUTE INVOLVED

American agrees that Section 2 of the Sherman Act, 15 U.S.C. §2, is central to the resolution of this case. Section 2 provides, in pertinent part:

> "Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. §2.

American disagrees that 14 C.F.R. §255 is at issue in this case. No claims for violation of that regulation were alleged below, and no such claims could have been alleged because the Department of Transportation has exclusive jurisdiction over the enforcement of its regulation. Moreover, this action, which was commenced only days after the effective date of the regulation, involves conduct that predated the regulation.

STATEMENT OF THE CASE

The Court has been asked by Northwest to review the Ninth Circuit's affirmance of summary judgment in favor of American on a claim that it was unlawful for American to use alleged monopoly power in the market for the provision of computerized reservation system ("CRS") services to airlines to achieve a competitive advantage in the market for air transportation.[2] However, Petitioner has

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[2] The case also involved claims that American had unlawfully monopolized the closely related market for the provision of CRS services to travel agents. That issue was resolved at a lengthy jury trial in favor of American, and no appeal was taken by Northwest from the jury's verdict. *Alaska Airlines, supra*, 948 F.2d at 539 n.4 (Pet. App.

conceded that American obtained the alleged monopoly power in the market for providing CRS services to airlines lawfully as a result of American's innovation and business acumen, and has conceded further that American did not monopolize or attempt to monopolize the air transportation market. *Alaska Airlines, Inc. v. United Air Lines, Inc.* (hereinafter *"Alaska Airlines"*), 948 F.2d 536, 546 (9th) Cir. 1991) (Petitioner's Appendix ("Pet. App.") at 17a) ("Plaintiffs. . .concede that each defendant's control of its CRS did not create a dangerous probability that the defendants would monopolize the downstream air transportation market."). *See also* 948 F.2d at 542, 546 (Pet. App. at 10a, 18a).[3] The trial court and the Ninth Circuit, relying upon this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984), held

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at 4a n.4). American argued (unsuccessfully) before the Ninth Circuit that the trial judgment barred relitigation of certain issues that are essential to Petitioner's "essential facility" and monopoly leveraging claims. *Id.*, 948 F.2d at 539-40 (Pet. App. at 5a-6a). American continues to believe that such a barrier exists.

[3] There is no question but that these matters were conceded below. In its brief in the Ninth Circuit, Petitioner admitted that each defendant had "acquired a lawful monopoly in the market for computerized reservation services to airlines." Appellants' Opening Brief at p. 2. *See also id.* at p. 18 ("Plaintiffs' second claim was that each defendant had lawfully acquired monopoly power in the relevant product market of CRS services provided to airlines. . . ."). Moreover, the trial court found, on the undisputed facts before it, that there was no evidence that would permit a reasonable jury to find that American had either monopolized or attempted to monopolize the air transportation market. *In re Air Passenger Computer Reservations Systems Antitrust Litigation* (*"In re CRS"*), 694 F. Supp. 1443, 1455 (C.D.Cal. 1988) (Pet. App. at 38a-39a) ("In this case there is no danger than American will monopolize the market for air transportation.") Northwest did not appeal that finding to the Ninth Circuit. Indeed, in its statement of the issues presented to the Ninth Circuit and in its argument regarding monopoly leveraging, Petitioner conceded that it was not claiming that American's conduct threatened monopolization in the downstream, air transportation market. Appellants' Opening Brief at pp. 2-3 & 32. In this Court, in its statement of the Question Presented for Review at page i, Northwest further concedes that the question presented here must assume that there is no threat of monopolization in the air transportation market ("although falling short of actual or attempted monopolization").

that the unilateral action of a firm that does not threaten monopolization does not violate Section 2 of the Sherman Act.

This case arises from the competition in the airline industry following deregulation of the industry by Congress in 1978. Prior to deregulation, the airlines had their fares, routes and services regulated by the Civil Aeronautics Board. Congress determined that regulation had stifled innovation and competition in the industry, and therefore removed the regulatory restrictions to encourage the airlines to compete and to bring about greater benefits for consumers.

American had been an innovator even during the days of regulation. American was the first airline to introduce "Super Saver" fares, thereby injecting at least some price competition into an otherwise stagnant process. In 1976 American pioneered a technological revolution in the travel industry by introducing SABRE, American's computerized reservation system or "CRS."[4] American spent over $400 million dollars on the design and operation of SABRE. Those expenditures began during a time when American was either losing money or barely breaking even on its airline operations. American's risk-taking, innovation and commitment to excellence made SABRE the premier CRS in the world, and travel agents, airlines and consumers have benefited from SABRE's technological advancements.[5] Today, all of these groups benefit from the com-

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[4] A CRS is made up of a centrally located computerized data base that is linked by phone lines to terminals located throughout the country, and in some foreign countries. The central data base contains information about flights, fares and reservations for a year into the future for the entire industry. A travel agent can access that data from a remote terminal, select an itinerary, make a booking, and print a ticket. Similar information is available about car rentals, hotels, and other travel-related services, and similar transactions can be processed regarding those products. *Alaska Airlines, supra*, 948 F.2d at 538 (Pet. App. at 2a-3a).

[5] As American's Chairman testified: "[W]e did. . .exactly what companies are supposed to do in a free enterprise society. We figured out

puterized services provided by SABRE and the three other CRSs available in the United States.

During the time that American was investing in new CRS technology, Northwest was earning substantially higher profit margins on its airline operations than was American, and was reinvesting those profits in new aircraft or distributing the profits to its shareholders.[6] Northwest did not invest in a CRS in the early days, when the risk was great and acceptance was questionable. It was not until 1987 that Northwest purchased a part interest in an existing system, PARS, that had been developed by Trans World Airlines, Inc.

American's investment in SABRE proved to be a risk that was worth taking. SABRE has been profitable. However, it is conceded that any competitive advantage in the air transportation market gained by American as a result of its CRS was not sufficient to threaten monopolization of that market.[7] During the relevant period, American's

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there was a need for something. . .[we] put the assets in it and created a team of people absolutely dedicated to making it the best. And the result has been that we have got a very successful system." Excerpt of Record of American Airlines, Inc. in the Ninth Circuit ("ER") at 4:73.

[6] Northwest's Annual Report in 1984 boasted that it had been profitable every year since 1950, and had paid cash dividends to shareholders for 30 consecutive years. ER at 21:221. In its 1988 Annual Report, Northwest reported record earnings and its "39th straight year of profitability." ER at 21:228. Between 1970 and 1988, while American was investing heavily in SABRE, Northwest paid out to its shareholders about $220 million in dividends. ER at 4:60.

[7] While Petitioner asserts that American gained a competitive advantage in the air transportation market from its ownership of SABRE, no evidence of any such advantage was presented to the courts below. For purposes of discussing the applicability of *Copperweld* to the "essential facility" theory and the monopoly leveraging doctrine, American presumes for purposes of argument that proof of a competitive advantage short of threatened monopolization could have been presented. However, as argued at Parts II and III, *infra*, Petitioner's failure to offer proof of any such competitive advantage provides an independent ground for denying certiorari in this case.

share of the domestic air transportation industry was never greater than 14%.

Northwest, having ignored American's labors to develop a CRS while spending its profits on other assets or distributing them to shareholders, now claims that American should be punished for its foresight, and forced to share the benefits of its investment with those who took no risks and made no investment, as if they were part owners.[8] The fact is that American has permitted Northwest and other airlines to benefit from the development of SABRE. From the day SABRE was introduced, Northwest has been a participating carrier in SABRE and its flights and fares have been listed in SABRE and available for sale by travel agents using SABRE. Northwest complains that American got a competitive advantage because, for a period of time, American's flights were given a preference in SABRE displays over the flights of others, including Northwest, and because Northwest had to pay a fee for bookings received through SABRE, while American did not pay itself a fee.[9] But American made the investment in SABRE, and took the risk. Its actions were perfectly reasonable, and had no anticompetitive effects.

The trial court (U.S. District Judge Edward Rafeedie, Central District of California) found that even if everything

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[8] According to American's Chairman, American had to "scrape" to get the money for SABRE "while we were selling off our 747s." ER at 4:47-48. Meanwhile, Northwest was *buying* 747s and making substantial distributions to its shareholders. *See* note 6, *supra*.

[9] Northwest was a co-host in SABRE prior to November of 1984, and as such received a preference for its flights over those of non-co-hosts, including the flights of Northwest's primary competitor, United. Similarly, as a co-host, Northwest paid a booking fee that was substantially less than that paid by many other non-co-host airlines. Northwest does not complain about these instances of more favorable treatment. Moreover, Northwest's own witnesses testified that there was nothing wrong with American giving its own flights some preferential treatment in its own CRS. ER 8:130; 16:186. Northwest's witnesses also acknowledged that the booking fee that its CRS, PARS, had charged, which was the same as that charged by SABRE, was reasonable. ER 17:188.

that Northwest had alleged were true and were viewed in the light most favorable to Northwest, American's actions did not amount to a violation of Section 2. Relying upon the words of the statute and this Court's decision in *Copperweld*, the trial court noted that Section 2 prohibits unlawful monopolization or attempted monopolization.[10] The court then held that there was no violation of Section 2, whether one used the "essential facility" theory or the monopoly leveraging doctrine, because there was no evidence that would suggest that there was the required dangerous probability that American would successfully monopolize the air transportation market.[11] The Ninth Circuit affirmed in a unanimous opinion written by Judge Hall, and joined by Judges Norris and Trott.

SUMMARY OF ARGUMENT

In *Copperweld* this Court pronounced the law that applies to this case. The Court held that the conduct of a single firm is governed only by Section 2's prohibition of threatened monopolies. The Court stated:

> The conduct of a single firm is governed by Section 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a

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[10] The statute's prohibition of conspiracies and combinations to monopolize was never at issue in this case.

[11] It is conceded by Petitioner that the fundamental issue here is the scope and application of Section 2, whether the analysis is done under the rubric of monopoly leveraging or "essential facility." Petition at p. 12. The words of the statute define a violation, and the related "doctrines" or theories used by the courts have vitality only to the extent that they are properly based upon the words of the statute—they cannot be independent grounds for imposing Section 2 liability. *See In re Air Passenger Computer Reservations Systems Antitrust Litigation* (hereinafter *"In re CRS"*), 694 F. Supp. 1443, 1455 (C.D. Cal. 1988), *aff'd*, 948 F.2d 536 (9th Cir. 1991) (Pet. App. at 37a) ("The essential facilities doctrine must be tied to the particular statutory provision under which relief is sought. The doctrine itself is an abstraction designed to assist the courts in determining whether the statute has been violated.").

> vigorous competitor may leave that impression. . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

467 U.S. at 767-68 (citations and footnotes omitted). The trial court and the Ninth Circuit below followed the holding of *Copperweld*, and have done nothing inconsistent with the decisions of this Court. Thus, there is no basis for granting certiorari in this case pursuant to Rule 10.1(c) of the Rules of this Court (conflicts with prior decisions of the Supreme Court).

The decision below does conflict with the Second Circuit's thirteen-year-old, pre-*Copperweld* decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). However, it is *Berkey* that is incorrectly decided, not this case. *See* 444 U.S. at 1094 (Justices Rehnquist and Powell dissented from the denial of certiorari in *Berkey*, stating that *Berkey*'s theory is "little less than bizarre."). Moreover, *Berkey* was decided before *Copperweld*. As other Circuits focus upon the impact of *Copperweld*, they are likely to reject *Berkey* as the Ninth Circuit did here. Thus, while a conflict in the Circuits might technically exist, it is a conflict that should correct itself without intervention by this Court, and is not a basis for granting certiorari in this case pursuant to Rule 10.1(a) (conflicts among the Circuits).

Finally, even if this Court were to grant certiorari, repudiate *Copperweld*, and disagree with the Ninth Circuit's legal holdings regarding the "essential facility" and monopoly leveraging doctrines, the Petitioner in this case still would not be entitled to a reversal of the summary judgment granted against it because the undisputed material facts do not provide a basis for a trial. The undisputed

facts show that Northwest had access to SABRE, the alleged "essential facility," at all times. They also show that American did not use any alleged monopoly power in the market for providing CRS services to airlines to gain an advantage in the air transportation market, nor did it do anything else that was anticompetitive in the air transportation market. Thus, this case is fact bound, and not a proper vehicle for defining the scope of the "essential facility" and monopoly leveraging doctrines, if such further definition is required.

For these reasons, this Court should deny certiorari in this action and permit the orders of the trial court and the Ninth Circuit to become final.

ARGUMENT

I. THE DECISION BELOW IS COMPELLED BY THIS COURT'S OPINION IN *COPPERWELD*, AND IS CONSISTENT WITH ALL OTHER DECISIONS OF THIS COURT

This Court specifically addressed and unequivocally limited the scope of Section 2 in *Copperweld*. The Court stressed that Section 2 was substantially narrower in reach than the conspiracy provision, Section 1 (15 U.S.C. §1). 467 U.S. at 774-75. Capturing the essence of Section 2, the Court stated: "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." 467 U.S. at 768.[12]

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[12] Petitioner contends that *Copperweld* is a Section 1 conspiracy case and has no applicability to Section 2. That is not correct. In *Copperweld* the Court was called upon to decide whether the conduct of a parent company and its wholly-owned subsidiary was the conduct of a single entity (and thereby judged under Section 2) or the conduct of a conspiracy (and thereby judged under Section 1). By defining the differences between the two statutory provisions, the Court focused upon why the inquiry was so important. *See* 467 U.S. at 769 (the distinction between Section 1 and Section 2 was "*necessary* for a proper understanding of the terms 'contract, combination. . .or conspiracy' in §1") (emphasis added).

In defining the scope of Section 2, the Court in *Copperweld* observed that there could be single firm conduct that restrained trade, but would violate neither Section 1 nor Section 2. Still, the Court concluded that such a statutory scheme was "eminently sound":

> It cannot be denied that §1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. . . .An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to §1 liability. We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. . . .Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, §1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of §2.

467 U.S. at 774-75.

Copperweld, of course, is the product of the language chosen by Congress to express its will. Section 2 provides: "Every person who shall *monopolize* or *attempt to monopolize*. . .shall be guilty of a felony." 15 U.S.C. §2 (emphasis added). The statute prohibits unilateral conduct that

threatens actual monopolization of a relevant market. At no place does Section 2 make it unlawful for a single firm to gain a competitive advantage. *See* P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶626.1 at p. 511 (1989 Supp.) ("[I]n any event, §2 is concerned with monopoly or the threat of it. Liability not connected with that concern has no place within this statute."). The act of seeking an advantage over competitors is the essence of competition—the goal the antitrust laws encourage. The antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The analysis does not change when a firm lawfully possesses monopoly power in a relevant market. Section 2 prohibits *monopolization*—the *unlawful* acquisition or maintenance of monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). *Lawfully* acquired and maintained monopoly power is an asset of the firm that has developed it pursuant to foresight, business acumen, and drive. That asset may be used to compete, so long as the firm does not engage in conduct that threatens the creation of an *unlawful* monopoly. *Olympia Equipment Leasing v. Western Union Telegraph Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("[T]he Sherman Act. . .does not render unlawful all monopolies. . . .A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.").

Northwest conceded below that it could not show any support for a claim that American's conduct threatened unlawful monopolization of any relevant market. In the market for providing CRS services to airlines, Northwest claimed that American had monopoly power, but conceded that any such monopoly power was lawfully obtained as

a result of American's innovative development of SABRE. In the market for air transportation, the undisputed evidence showed that the industry was extremely competitive, that American's market share was less than 14%, and that American's low market share had been stable over time. Northwest conceded that there was no triable issue of fact regarding threatened monopolization of the air transportation market.[13]

There is no support in the decisions of this Court for the argument that the alleged use of lawfully acquired monopoly power to gain a mere competitive advantage is enough to violate Section 2. Petitioner's reliance on *United States v. Griffith*, 334 U.S. 100 (1948), is misplaced. This Court's holding in *Griffith* was that the defendants had "formed a conspiracy in violation of §§ 1 and 2 of the [Sherman] Act." 334 U.S. at 109. Thus, *Griffith* was a concerted action case and was decided under the antitrust principles applicable to such cases, not those applicable to single firm conduct. Ignoring *Griffith*'s holding, Petitioner cites to a single statement from the opinion: "[T]he use of monopoly power, however lawfully acquired,. . .to gain

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[13] Petitioner complains that the trial court drew inferences and made factual assumptions from the market share information. After American presented market share and other information that tended to rebut any inference of threatened monopolization of the air transportation market, the burden was on Northwest to come forward with evidence that would support a jury finding to the contrary. Rule 56(c), Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Northwest came forward with nothing—not one shred of evidence showing any anticompetitive effect in the air transportation market. To the extent that the trial court relied purely upon market share information, it was because that was all that was before the trial court. Moreover, such reliance is perfectly proper. *Richter Concrete Corp v. Hill-Top Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271 (7th Cir.), *cert. denied*, 455 U.S. 921 (1981) (30% market share insufficient to support attempt to monopolize claim); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 672 F. Supp. 724 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989) (20% market share insufficient); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) (50% market share insufficient).

a competitive advantage. . .is unlawful." 334 U.S. at 107. But this isolated dicta cannot be reconciled with the later statement by this Court in *Copperweld*: "It is not enough that a single firm appears to 'restrain trade'." *Copperweld, supra*, 467 U.S. at 767. Thus, *Griffith*'s holding is consistent with *Copperweld* and with the holding of the courts below. The interpretation that Petitioner attempts to place upon a single statement from *Griffith*, taken out of context, is unreasonable, for it would render that statement inconsistent with this Court's decision in *Copperweld*.

Petitioner also relies upon *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). However, in *Otter Tail* the evidence established that the defendant had "*attempted to monopolize* and had *monopolized* the retail distribution of electric power in its service area" by refusing to provide certain towns access to its wholesale electric power facility. 410 U.S. at 368, 371, 377-79 (emphasis added). Thus, *Otter Tail*'s holding is consistent with *Copperweld* and with the holdings of the courts below. It rested on a finding of monopolization and attempted monopolization of the downstream market.

A. TO THE EXTENT THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE MONOPOLY LEVERAGING THEORY, THE VIEW OF THE NINTH CIRCUIT IS CORRECT AND REPRESENTS THE TREND AMONG THE CIRCUITS AFTER *COPPERWELD*

As discussed above, the trial court and the Ninth Circuit followed the teachings of *Copperweld* and the language of Section 2 exactly, and the results are clearly correct. Petitioner relies on the thirteen-year-old—and pre-*Copperweld*—decision of the Second Circuit in *Berkey* as the basis for claiming a conflict among the Circuits with respect to the theory of monopoly leveraging.[14] That conflict, to the

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[14] Petitioner actually abandoned its monopoly leveraging claim in the trial court by failing to argue the theory in its papers and by express representation to the court. While Respondent's judicial estoppel ar-

extent it exists, is not sufficient to warrant certiorari in this case.

Berkey is clearly wrong, and is much criticized. *Ass'n for Intercollegiate Ath. for Women v. N.C.A.A.*, 735 F.2d 577, 586n.14 (D.C. Cir. 1984) (noting "the substantial academic criticism cast upon the leveraging concept," and citing R. Posner & F. Easterbrook, ANTITRUST, 802-10, 870-71 (2d ed. 1981); R. Bork, THE ANTITRUST PARADOX, 365-66, 372-75 (1978); Markovits, *Tie-ins, Leverage, and the American Antitrust Laws*, 80 YALE L.J. 195, 199-205 (1970); and Bowman, Jr., *Tying Arrangements and the Leveraging Problem*, 67 YALE L.J. 19, 21-29 (1957)). To some extent *Berkey* can do little harm, however, because it is fact bound. Significantly, *Berkey* did not hold that the defendant was liable under a theory of monopoly leveraging. The Second Circuit merely sent the case back with instructions to revisit the issue. In doing so, the Second Circuit also added many qualifying statements that substantially diluted the impact of the broader language about leveraging.

While it would not be wrong for this Court to affirm the Ninth Circuit and disapprove *Berkey*, American submits that it is unnecessary. Other courts have questioned *Berkey*[15] or have not followed it.[16] The Second Circuit has

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gument was rejected by the Ninth Circuit (*Alaska Airlines, supra*, 948 F.2d at 539-40, 546 n.15 (Pet. App. at 5a-6a, 18a n.15)), Respondent continues to believe that its estoppel position has merit.

[15] The Eleventh and the Fourth Circuits have questioned *Berkey* without reaching the issue. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1567-68 (11th Cir. 1990) ("...we harbour some reservations about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be provided..."); *Advanced Health-Care Services v. Radford Community Hospital*, 910 F.2d 139, 149 n.17 (4th Cir. 1990). Prior to rejecting *Berkey* outright, the Ninth Circuit also took this conservative, wait and see, approach. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (it is "an elaborate fiction at best" that a firm "monopolizes" the market in which it has lawful monopoly power by using that power to gain an advantage in another market); *Syufy Enterprises v. American Multicinema*, 793 F.2d 990, 998 n.10 (9th Cir. 1986), *cert. denied*, 479 U.S.

itself characterized some of the related passages in *Berkey* as "dictum." *Twin Laboratories, Inc. v. Wieder Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) (distinguishing *Berkey*).

As the courts have become more aware of this Court's pronouncement in *Copperweld*, they will inevitably reject *Berkey*. This process can be seen clearly in the Sixth Circuit. In *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989), the Sixth Circuit appeared to follow *Berkey* without reference to *Copperweld*.[17] However, in a more recent decision by the Sixth

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1031 (1987). *See also Grason Electric Co. v. Sacramento Municipal Utility Dist.*, 571 F. Supp. 1504, 1517 (E.D. Cal 1983), *rev'd on other grounds*, 770 F.2d 883 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986). The D.C. Circuit has questioned *Berkey's* validity. *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (noting "the substantial academic criticism cast upon the leveraging concept"). Recently, the D.C. Circuit has addressed the leveraging question in a way that would be inconsistent with *Berkey*, although there was no mention of *Berkey* in the opinion. *United States v. Western Electric Co.*, 1990-1 Trade Cas. (CCH) ¶68,973 at p. 63,259-60 (D.C. Cir. 1990) (per curiam) ("[U]nless the entering [firm] will have the ability to raise prices or restrict output [i.e., monopoly power] in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power [in the other market] to 'impede competition.' ").

[16] *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1461 (D.Kan. 1990) (projecting that the Tenth Circuit would not recognize monopoly leveraging as an independent Section 2 offense), *aff'd on other grounds*, ___ F.2d ___, 1992-1 Trade Cas. (CCH) ¶69,703 (10th Cir. 1992); *M&M Medical Supplies & Service v. Pleasant Valley Hospital*, 738 F.Supp. 1017, 1021 (S.D.W.Va. 1990) (leveraging claim must be treated as a claim for attempted monopolization).

[17] *Kerasotes* was not actually a leveraging case, and does not conflict with the decisions of the courts below. In *Kerasotes* the counterdefendants were charged with conspiring to monopolize and to attempt to monopolize the market for exhibiting first-run films in Flint, Michigan. Thus, *Kerasotes* not only involved concerted activity, but it also involved claims of actual monopolization or attempted monopolization of the downstream market, not a mere competitive advantage in that market.

Circuit where *Copperweld* was brought to the court's attention, the Sixth Circuit relied heavily upon the same language from *Copperweld* that was cited by the courts below in this case, and gave *Kerasotes* a narrow interpretation consistent with the teachings of *Copperweld*. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1422-23, 1426-27 (1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 274 (1991). The process has corrected the situation in the Sixth Circuit without intervention by this Court.

Thus, there is no need to grant certiorari in this case because the decisions below were clearly correct, and any conflict among the Circuits is likely to resolve itself over time in light of the guidance provided by this Court in *Copperweld*. The courts are recognizing, as the Ninth Circuit has recognized, that the language of Section 2 compels proof of unlawful monopolization or attempted monopolization in at least one market to support a finding of liability. *See* Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959) ("[E]ven where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals.").

B. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE "ESSENTIAL FACILITY" DOCTRINE, AND THE VIEW OF THE NINTH CIRCUIT IS CORRECT

The opinions of the lower courts discussing the "essential facility" doctrine have used different types of language, but have all been decided consistent with *Copperweld* and the language of Section 2. The "essential facility" concept was coined in connection with fact situations where a firm or a group of firms controlled an asset that was "essential" to other firms that wished to compete.[18] By definition, if the asset was essential to one's

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[18] The concept was first used in connection with boycotts organized by groups of competitors against outsiders. *See, e.g., United States v.*

ability to compete, denial of access to that asset would result in the monopolization of the relevant market by the firm or firms holding the asset. Thus, the concept of essentiality in the "essential facility" doctrine keeps the theory in accord with the language of Section 2 and the teachings of *Copperweld*.

For example, in *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the court noted that if access to a truly "essential" facility is denied, "all possible competition is by definition excluded." 570 F.2d at 993 n.45. In *Twin Laboratories, Inc. v. Wieder Health & Fitness, supra*, the Second Circuit held: "As the word 'essential' indicates, a plaintiff must show more than inconvenience or even some economic loss; he must show that an alternative to the facility is not feasible." 900 F.2d at 570. In *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 2041 (1991), plaintiff met its burden at the summary judgment stage by showing that denial of access to the defendant's railroad tracks could amount to actual monopolization of the relevant market for transporting newsprint because access was "essential" to the ability to compete in the newsprint shipping market. 902 F.2d at 176, 179.[19]

Terminal Railroad Association, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945). These cases involved concerted activity and therefore were judged under different principles than would be applied to single firm conduct. III P. Areeda & D. Turner, ANTITRUST LAW, ¶729 at p. 242-43 (1978); Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 ANTITRUST L.J. 841, 844-45 (1990); Note, *The Legal and Regulatory Implications of Airline Computer Reservations Systems*, 103 Harv. L. Rev. 1930, 1938 (1990). A concerted action case expressly relied upon by Petitioner is *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (group of owners of Chicago Stadium conspired to monopolize market for professional basketball in Chicago by denying access to stadium).

[19] *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987), which is also relied upon by Petitioner, actually involved the affirmance of summary judgment for defendant on an "essential facility" claim where the court found that the simultaneous

The Seventh Circuit has distinguished between those occasions when denial of access to an allegedly "essential" facility eliminated competition and resulted in monopolization or threatened monopolization (*MCI Communications Co. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)), and those where denial of access caused a competitive disadvantage (*Olympia Equipment Leasing v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987)). The Ninth Circuit expressly adopted the approach taken by the Seventh Circuit. *Alaska Airlines, supra*, 948 F.2d at 543-44 (Pet. App. at 12a-13a).

Thus, there is no conflict between the Ninth Circuit's holding below regarding the "essential facility" claim and the holdings of other courts. All have required proof that the denial of access to the "essential" asset would amount to the unlawful monopolization or attempted monopolization of the market in which that asset is used to compete. The conceded absence of any such threatened monopolization of the air transportation market was a valid basis for the rulings of the courts below.

II. EVEN UNDER PETITIONER'S INCORRECT INTERPRETATION OF SECTION 2, SUMMARY JUDGMENT FOR RESPONDENT WAS STILL THE APPROPRIATE OUTCOME ON THE FACTS OF THIS CASE

Even if the monopoly leveraging and "essential facility" doctrines were a basis for imposing antitrust liability independent of the words of Section 2 (which they are not), the undisputed material facts before the trial court nonetheless supported the entry of summary judgment for American.[20] Thus, any consideration of those overriding

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delivery of yellow pages and white pages was extremely advantageous for the yellow pages publisher, but was not "essential" to the ability to compete in the publication of yellow pages directories. 833 F.2d at 612-13.

[20] The trial court arguably found that Petitioner was entitled to a trial of its monopoly leveraging claim but for the application of *Copperweld's* requirement that there be proof of threatened monopolization

legal issues presented by Petitioner would be academic in this case. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (review should be limited to those important legal issues that are "beyond the academic or the episodic").

A. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN DID NOT "USE" ITS ALLEGED CRS MONOPOLY POWER IN THE AIR TRANSPORTATION MARKET, AND DID NOT GAIN ANY UNWARRANTED COMPETITIVE ADVANTAGE IN THAT MARKET

To support the imposition of antitrust liability for monopoly leveraging under Petitioner's theory, the defendant must "use" the monopoly power it supposedly possesses in one market to gain an "unwarranted competitive advantage" in the other. *Berkey, supra*, 603 F.2d at 275. However, not all advantages gained by an alleged monopolist are the result of the use of monopoly power. Even *Berkey* recognized that there were advantages and benefits that might flow to an integrated firm for reasons separate from and independent of that firm's monopoly power. *Berkey, supra*, 603 F.2d at 276. *See also Catlin v. Washington Energy Co.*, supra, 791 F.2d at 1347.

The alleged "use" of CRS monopoly power by American is tied to two things: the use of airline preference in SABRE displays, and the charging of booking fees.

It is conceded that American used preference in ranking flights in SABRE displays prior to November of 1984. Was this use of preference a "use" of monopoly power? It could not have been. Every CRS, including those that were very

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of the downstream market. *In re CRS, supra*, 694 F. Supp. at 1473-74 (Pet. App. at 72a-74a). However, given the court's holding, this discussion was dicta. American respectfully submits here, as it did in the Ninth Circuit, that the trial court's grant of summary judgment in favor of American would have been warranted even without reliance upon *Copperweld* because of Petitioner's failure to offer proof of the other elements of its monopoly leveraging claim.

small and which are not alleged to be "monopolists," gave the flights of their owners or partners some form of preference in their displays. *In re CRS, supra*, 694 F. Supp. at 1473 (Pet. App. at 72a) ("Display biasing can be accomplished by any firm which is vertically integrated in both the CRS and air transportation market. Biasing has been used since the inception of the CRS."). Nor was the use of preference done with an anticompetitive purpose—unless it is a violation of the antitrust laws to attempt to maximize one's sales as compared with those of one's competitors. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 829 F.2d 1471, 1475 (9th Cir. 1987), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 180 (1988) (a single firm's conduct does not violate Section 2 if it has any legitimate economic motive, even if the firm acts with the specific intent to maintain or increase its market share). Northwest's own witnesses conceded that the use of display preference was not wrong (ER 8:130; 16:186), and Northwest did not seek damages in the trial court for sales allegedly lost as a result of display preference. USAir Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' *In Limine* Motion to Exclude Section 2 Damage Claims (March 25, 1988) at 11, 13; Memorandum of Points and Authorities of the USAir Plaintiffs in Opposition to Defendant American's Motion for Summary Adjudication on the Issue of Antitrust Immunity (April 28, 1988) at 2.

Similarly, the charging of booking fees to Northwest could not constitute the "use" of monopoly power. The fees were always modest and were only assessed when a passenger actually made a booking and did not cancel prior to departure. *Alaska Airlines, supra*, 948 F.2d at 539 (Pet. App. at 3a-4a) ("The $1.75 fee to secure a booking is of little consequence because a $300 or $400 fare may otherwise be lost. . . .CRS fees are a relatively small part of the total costs incurred by a 'booked' airline when it provides air transportation to a paying passenger. . . ."). Moreover, SABRE's booking fees were the same as those charged by other CRSs, including PARS both prior to and after Northwest purchased an interest in it. All CRSs

charged booking fees for the simple reason that a CRS costs a great deal of money to develop and operate, and to give away its services would be folly.[21]

Finally, there was no evidence before the trial court that would warrant a trial on whether American's use of preference or its charging of a booking fee actually caused competitive injury in the air transportation market. Petitioner offered no evidence below of any unwarranted competitive effects in the air transportation market other than non-specific claims that American's CRS shifted revenues from other airlines to American. There was no showing that there was an actual effect on the competitive process. Even if it is presumed, in the absence of any evidence, that Northwest might have had more bookings if American's flights had not had preference in SABRE, and that perhaps Northwest would have been even more profitable if it did not have to pay booking fees, there was no evidence before the trial court that either thing had any effect on Northwest's ability to compete, or on competition in the marketplace in general. *See Twin Laboratories, Inc. v. Wieder Health & Fitness*, 900 F.2d 566 (2d Cir. 1990) (affirming summary judgment against plaintiff despite defendant's refusal to advertise plaintiff's products in defendant's magazines; even though plaintiff's expert claimed that plaintiff would have grown more had it been granted access to the magazines, the denial did

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[21] Even if American had charged a "monopoly price" for access to SABRE, which it obviously did not because it charged the same rates as every other CRS, such conduct would not amount to the anticompetitive "use" of monopoly power. The charging of a high price—even a "monopoly price" charged by a lawful monopolist—is not an anticompetitive act. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) ("[A]n excessive price alone does not establish a violation of the antitrust laws, because imposition of a high price is not, in and of itself, an anticompetitive act."). *See also Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986); *Continental Cablevision of Ohio, Inc. v. American Electric Power Co.*, 715 F.2d 1115, 1120 (6th cir. 1983). The charging of a high price can attract new entry and result in greater competition.

not keep plaintiff or others from competing). Thus, even under *Berkey*, summary judgment for American was proper.

B. SUMMARY JUDGMENT FOR AMERICAN SHOULD BE AFFIRMED BECAUSE THE UNDISPUTED FACTS SHOWED THAT AMERICAN NEVER DENIED NORTHWEST ACCESS TO SABRE, AND THAT SUCH ACCESS WAS NOT "ESSENTIAL"

Even under Petitioner's view of the "essential facility" theory, there must be proof of a denial of access to a facility that is essential to a firm's ability to compete in a downstream market. It is an undisputed fact that Northwest's flights, fares and seat availability were listed in SABRE from the day SABRE was first offered to travel agencies. *Alaska Airlines, supra*, 948 F.2d at 545 (Pet. App. at 16a) ("American [has] never refused any of the plaintiffs access"). There have been cases where the owner of an essential facility has set its prices so high as to amount to a practical denial of access. *See Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-79 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2041 (1991); *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1534-35 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989). However, this is not such a case. The record before the trial court showed that American charged booking fees that were the same as those charged by other CRSs, and no airline, including Northwest, ever declined to participate in SABRE because of the booking fees. Thus, there is no evidence that access was denied.[22]

Moreover, the undisputed evidence also supports summary judgment for American on the ground that SABRE is not an "essential" facility. The record shows that there were always a number of ways in which an airline could sell its tickets, including at least three other CRSs. ER

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[22] *See* L. Sullivan, Antitrust, at 117-18 and 126-27 (1977) (the price that the owner of an "essential facility" may charge may be a high price and may even include monopoly profits).

5:78-89; 26:243-44; 31:251; 32:252. SABRE accounted for only 26 percent of the reservations made on airlines. *Id.* One very successful airline, Southwest, never participated in any CRS. Thus, while SABRE might be "an excellent means of reaching potential customers," it was not essential. *See Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987). *See also In Re CRS, supra*, 694 F. Supp. at 1455 (Pet. App. at 38a).

III. PETITIONER'S CHALLENGES ARE FACT BOUND, AND WERE NOT ASSERTED IN THE COURTS BELOW

Petitioner charges that the courts below improperly resolved fact issues on the basis of economic theory at the summary judgment stage. Pet. at pp. 16-20. These new claims, raised for the first time in this Court, are misrepresented and do not provide a basis for granting certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The material facts were not disputed below. Petitioner *conceded* that there was insufficient evidence to support a finding that American had unlawfully monopolized or attempted to monopolize the market for the provision of CRS services to airlines. Petitioner also *conceded* that there was insufficient evidence to support a finding of unlawful monopolization or attempted monopolization of the air transportation market. These were the material facts that must draw any court to conclude that there was insufficient evidence to support a finding that Section 2 had been violated.

The fact issues raised by Petitioner in this Court are not only not material, they are raised in this Court for the first time contrary to established prohibitions. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no occasion to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."). Petitioner seeks to characterize the problem

as one that occurred in the Court of Appeals, and thereby tries to justify its delay in raising these issues. However, the factual record was established in the trial court, and the Court of Appeals merely affirmed that the trial court had acted properly. The failure to object in the Ninth Circuit to the trial court's findings as to the undisputed material facts precludes Petitioner from raising such claims now.[23] *Steagald v. United States,* 451 U.S. 204, 209 (1981) (the right to raise factual issues before the Supreme Court may be lost "when [a party] has acquiesced in contrary findings by [the courts below]").

These supposed fact issues are also bogus. For example, there was no evidence of any "price squeeze" resulting from onerous booking fees. American's booking fees were no higher than those charged by every other CRS (including the CRS partially owned by Petitioner). Moreover, the undisputed facts established that those booking fees were too modest to put any airline into a "squeeze." *Alaska Airlines, supra,* 948 F.2d at 539 (Pet. App. at 3a-4a) ("The $1.75 fee to secure a booking is of little consequence because a $300 or $400 fare may otherwise be lost. . . .CRS fees are a relatively small part of the total costs incurred by a 'booked' airline when it provides air transportation to a paying passenger. . . .").

The citation to air transportation market share data in the opinions of the lower courts is not unusual. Market share data can be used to assess market power in the context of Section 2. *See* footnote 13, *supra*. American offered the market share data to rebut any inference that American's conduct had threatened unlawful monopolization of the air transportation market. At that time the burden shifted to Petitioner to come forward with admis-

[23] Moreover, there was no error committed by the trial court. The court issued a detailed opinion that showed a careful consideration of the entire record, and properly looked at the undisputed material facts "in a light most favorable to the plaintiffs." *In re CRS, supra,* 694 F. Supp. at 1465 (Pet. App. at 25a) ("Looking at the facts in a light most favorable to the plaintiffs, American's conduct may restrain trade, but it does not threaten monopolization.").

sible evidence that would at least create a jury question on the issue of monopolization.[24] Rule 56(c), Federal Rules of Civil Procedure. Petitioner chose not to offer any evidence of competitive impact in the downstream air transportation market. Indeed, Petitioner conceded that monopolization of the air transportation market was not threatened. Thus, the lower courts' citation to the market share data was justified, and did not involve any improper "fact-finding."[25]

CONCLUSION

For the reasons set forth above, this case, which was correctly decided below, does not raise issues that are proper for review on a petition for certiorari.

Dated: March 16, 1992

Respectfully submitted,

ROBERT E. COOPER*
J. EDD STEPP, JR.
STEVEN C. MCCRACKEN
MARK E. WEBER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
Attorneys for Respondent
AMERICAN AIRLINES, INC.

*Counsel of Record

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In the Supreme Court of the United States

October Term, 1991

ALASKA AIRLINES, INC. and
TRANSTAR AIRLINES CORPORATION,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

MAXWELL M. BLECHER
Counsel of Record

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
611 West Sixth Street
Suite 2800
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioners
ALASKA AIRLINES, INC., TRANSTAR AIRLINES CORPORATION
and NORTHWEST AIRLINES, INC.

March 26, 1992

Westside Law Publishers Los Angeles, California (310) 207-0272

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SUMMARY OF ARGUMENT

Petitioners (Alaska Airlines, Inc., Transtar Airlines Corporation and Northwest Airlines, Inc.) submit this Reply Brief in Support of their Petition for Writ of Certiorari pursuant to United States Supreme Court Rule 15.6. Contrary to respondents' arguments, certiorari should be granted for at least three reasons.

1. There is a clear and definite conflict among the circuits with respect to monopoly leveraging. It is simply wrong to assert that the circuits have relied on *Copperweld Corp. v. Independence Tube Corp.* 467 U.S. 752 (1984), to erode *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

2. There is also a clear conflict among the circuits with respect to the essential facilities doctrine.

3. Assuming the Ninth Circuit was wrong on either its monopoly leveraging holding or its essential facilities holding, the case must be remanded to the district court for trial.

I.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE MONOPOLY LEVERAGING DOCTRINE THAT HAS NOT BEEN RESOLVED BY THIS COURT'S DECISION IN *COPPERWELD.*

The scope of the conflict among court decisions and academicians on the monopoly leveraging doctrine is well documented.[1] To avoid resolution of that conflict by this Court,

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[1] Citing a series of law review articles (extracted from *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984), respondent American Airlines, Inc., correctly observes that *Berkey* has been criticized. However, it has also been praised. *See* Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985), and the articles cited therein. Professor Kaplow's article begins with

(continued...)

respondents assert that this Court's decision in *Copperweld* has shown the lower courts "the light," and that *Copperweld* will now be uniformly "understood" and applied by other courts as it was in the Ninth Circuit's decision below as repudiating *Berkey*. Therefore, respondents conclude, there is no need for this Court to trouble itself with resolving the present conflict. That is wrong. Not a single case (aside from this one) even mentions *Copperweld* in analyzing or discussing monopoly leveraging.

First, as respondent American Airlines, Inc. ("AA") admits, the Sixth Circuit in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom. G. K. C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989), followed *Berkey* without even mentioning *Copperweld*.[2] The Sixth Circuit saw nothing in this Court's *Copperweld* decision that even required discussion, much less mandated rejection of *Berkey*. Nor can AA

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[1](...continued)
these words: "The debate over the ability of firms to use restrictive practices to leverage their monopoly power from one market to another has continued throughout the history of the antitrust laws."

[2] AA, in its desperation to distinguish *Kerasotes*, says it "was not actually a leveraging case." (AA brief at 15 n.17.) AA characterizes *Kerasotes* as a conspiracy, rather than a unilateral conduct, case. But a simple reading of its holding dispels that view: "To run afoul of the antitrust laws, it is not necessary that *the party* attempting to leverage *its* monopoly power from a given market into a second market possess monopoly power or dominant market position in that second market." 854 F.2d at 137 (emphasis added). The *Kerasotes* court went on to note that "to extend *a business*' dominance from one market into a second market, without having to achieve that dominance in the second market" was unlawful. *Id.* (emphasis added to demonstrate that the court was addressing a single firm conduct). Moreover, *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1566-68 (11th Cir. 1990), cited by AA, clearly views Kerasotes as a leveraging case that follows *Berkey*.

plausibly maintain that the Sixth Circuit changed course two years later in *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1422-23, 1426-27 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 274 (1991). While the court in Langenderfer quoted extensively from *Copperweld*, it did so merely to distinguish generally between Sections 1 and 2 of the Sherman Act—*not* to comment on *Kerasotes*. To the contrary, the Sixth Circuit expressly addressed *Kerasotes* separately, explaining that *Kerasotes* "was principally concerned with 'leveraging' or misuse of monopoly power in one market to exclude a competitor from another market" (*id.* at 1426), and therefore inapplicable to the case at bar. Accordingly, there is no suggestion that the Sixth Circuit has retreated from its endorsement of and continued reliance upon *Berkey*, or that it sees any conflict between *Berkey* and *Copperweld*.

The other cases cited by AA are devoid of reference to *Copperweld*. The earlier Ninth Circuit decisions which reserved judgment on monopoly leveraging failed to cite or even mention *Copperweld*. *See Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Grason Electric Co. v. Sacramento Municipal Utility District*, 571 F. Supp. 1504 (E.D. Cal. 1983). The D.C. Circuit has found no relevance in *Copperweld* to the monopoly leveraging doctrine. *Copperweld* was decided by this Court *after Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 735 F.2d 577 (D.C. Cir. 1984), was decided by the D.C. Circuit. When it revisited monopoly leveraging in *United States v. Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied sub nom. MCI Communications Corp. v. United States*, ___ U.S. ___, 111 S. Ct. 283 (1990), the D.C. Circuit did not even mention *Copperweld*. The Second Circuit, which AA claims is backing away from *Berkey*, did not mention *Copperweld* in either *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672 (2d Cir. 1985) (citing *Berkey* and

United States v. Griffith, 334 U.S. 100, 107 (1948), for the monopoly leveraging elements), or *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990) (holding that plaintiff's claim in that case did not come within *Berkey*'s proscription because of failure to prove "tangible harm to competition").

While the Eleventh Circuit, in its substantial discussion of monopoly leveraging in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1567-68 (11th Cir. 1990), did "harbour some reservation about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be proved," the court never once mentioned *Copperweld*. Finally, the Fourth Circuit in *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 149 n.17 (4th Cir. 1990), "assume[d] that monopoly leveraging is an independent § 2 violation separate from monopolization and attempted monopolization," but "reserve[d] definitive resolution of that issue for a case in which the issue is squarely presented." That court, too, did not mention *Copperweld* in its monopoly leveraging discussion.

The district court cases relied on by AA likewise fail to support the view that *Copperweld* laid *Berkey*, *Kerasotes* and monopoly leveraging to rest. *M & M Medical Supplies & Service, Inc. v. Pleasant Valley Hospital, Inc.*, 738 F. Supp. 1017, 1021 (S.D. W. Va. 1990) viewed "harm to competition in another market" as embraced within the attempt to monopolize clause of Section 2. But its reasoning is not extensive and the monopoly leveraging discussion does not cite to *Copperweld*. Finally, *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1461 (D. Kan. 1990), *aff'd on other grounds*, ___ F.2d ___, 1992-1 Trade Cas. (CCH) ¶ 69,703 (10th Cir. 1992), also does not mention *Copperweld* in its discussion of whether the Tenth Circuit would recognize monopoly leveraging as a separate offense.

Not a *single case* cited by AA in its brief relied on—or even mentioned—*Copperweld* in its monopoly leveraging discussion. Only the Ninth Circuit has concluded that *Copperweld* rejected the monopoly leveraging doctrine articulated in *Berkey*. The reason no other court has relied upon *Copperweld* is that it has nothing to do with monopoly leveraging. *Copperweld*, aside from its holding that wholly owned subsidiaries cannot "conspire" with their parents for Sherman Act purposes, suggests that single firm conduct is actionable only when it "pose[s] a danger of monopolization." 467 U.S. at 768. That statement, with due respect, does no more than state the obvious. But here monopoly power is a given. The district court found that there was sufficient evidence of monopoly of the first or leveraging market for computerized reservations services to go to a jury: "The court has considered the internal elements under the theory of monopoly leveraging and has determining [sic] that plaintiffs have presented evidence sufficient to survive a motion for summary judgment." (App. 70a.) *Copperweld* did not decide whether, as the Ninth Circuit held, only the wilful *acquisition or maintenance* of monopoly power is within the reach of Section 2. Nor did *Copperweld* decide whether the use of monopoly power in one market to impair competition in a second market is permissible. *Copperweld* is silent on those questions and so it has not been and should not be cited as controlling in any serious consideration of the monopoly leveraging issue.

That very question—whether Section 2 also reaches misuse of monopoly power—has been addressed by an eminent judge in a post-*Copperweld* case. In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), cited extensively by AA, Judge Posner acknowledged the *Berkey* rule without questioning its validity:

> If, to maximize its profits in its monopoly market, a monopolist restricts competition in a related

> market, its conduct is actionable in a suit by a firm that is the target of the abusive practice.

Id. at 374. And Judge Posner explained why: "Not the possession, but the *abuse*, of monopoly power violates section 2." *Id.* (emphasis added).

Despite AA's attempt to bury it through *Copperweld* (a position supported only by the Ninth Circuit) *Berkey* lives—in the Seventh Circuit and every other circuit that has decided the question.

Copperweld simply did not rule on whether the use of monopoly power to lessen competition in a second, related market violates Section 2. There is a clear split among the circuits and expressed uncertainty in those circuits which have not yet specifically ruled. The academicians are divided. Conduct that is now legal in Los Angeles would subject a defendant to treble damage liability in New York or Detroit. The business community, the bench and the bar need to have this issue decided. Certiorari to review the monopoly leveraging question is entirely appropriate.

II.

THE CIRCUITS ARE ALSO IN CONFLICT ON THE ESSENTIAL FACILITIES DOCTRINE

Despite respondents' attempt to dance around the conflict, there is no way to reconcile the "severe handicap" standard of *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), or the Eighth Circuit's "inhibit competitors" standard in *City of Malden v. Union Electric Co.*, 887 F.2d 157 (8th Cir. 1989), with the "eliminate competition" test adopted here by the Ninth Circuit (App. 15a). No court other than the Ninth Circuit has expressly articulated that denial or limitation of access to an essential facility becomes actionable only if it threatens to produce or actually produces monopoliza-

tion. (*Id.* 17a.) These stringent standards render the doctrine of essential facilities redundant because any conduct meeting such standards could be independently attacked under the attempt to monopolize or monopolization clauses of Section 2. Thus, the Ninth Circuit is squarely at odds with the Second Circuit in *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2041 (1991), which expressly treated essential facilities as an independent claim, separate from attempted monopolization or monopolization.

Accordingly, even without relying on what respondents refer to as "concerted action" cases, it is evident that the Ninth Circuit has adopted a far more restrictive test for essential facilities than any other circuit. The Ninth Circuit's holding that there was no denial of access. (App. 16a)—argued at length by United—flies in the face of this Court's holding in the seminal essential facility case *United States v. Terminal Railroad Association*, 244 U.S. 383 (1912), requiring an "equal plane" between the owner of the facility and the competitor. By providing a "safe harbor" for the use of monopoly power falling short of an independent Section 2 violation, the Ninth Circuit sets itself far apart from the rest of the circuits. This sharp disparity, and the uncertainty and inconsistency it engenders, should be addressed by this Court.

III.

THE DISTRICT COURT EXPRESSLY FOUND THAT, BUT FOR THE REQUIREMENT OF THREATENED OR ACTUAL MONOPOLIZATION, THE MOTION FOR SUMMARY JUDGMENT WOULD HAVE BEEN DENIED

Respondents contend that summary judgment was sustainable independent of the erroneous conclusion that both monopoly leveraging and essential facilities require either

threatened or actual monopolization in the downstream market. That is plainly wrong.

The district court itself rejected this contention: "The court has considered the internal elements under the theory of monopoly leveraging and has determining [sic] that plaintiffs have presented evidence sufficient to survive a motion for summary judgment. However, it does not appear that the monopoly leveraging theory is consistent with the requirements of Section 2 of the Sherman Act. *On that basis, the court grants defendants' motion for summary judgment.*" (App. 70a (emphasis added).)

On the essential facilities claim, the district court found that defendants "may be able to raise . . . rival's costs through imposing monopoly prices in a related market" and that while this "may be enough to 'restrain trade', it is not enough to create a danger of monopolization." (*Id.* 38a n.4.)

The district court, therefore, found genuine issues of material fact as to whether respondents' conduct would "restrain trade," but then concluded that such level of restraint was legally insufficient, and granted summary judgment.

The Ninth Circuit, apparently to buttress a novel and unprecedented ruling which departs sharply from well settled Section 2 doctrine also impermissibly assumed the role of fact finder and decided the case as though it were a jury. In performing that role, it: (1) impermissibly ignored respondents' ability to impose a price squeeze on its competitors; (2) wrongly assumed that airlines were perfectly free, without serious consequence, to withdraw from a computer reservation system; (3) mistakenly concluded that travel agents were free to change computer reservation systems without serious consequences; and (4) placed undue reliance on market share as the dispositive measure of market power. This series of factual findings violates the basic procedures applicable to summary judgment. Moreover, the Ninth Circuit's findings are internally inconsistent and implicitly acknowledge that respondents had power adequate to price their

competitors out of the market. Therefore, on that basis it should have allowed the case to proceed, even under its incorrect ruling that only when competition in the downstream market is threatened with complete elimination is the monopolist's conduct actionable.

IV.

CONCLUSION

The Ninth Circuit is out of step with the rest of the circuits in holding that both monopoly leveraging and essential facilities require proof of actual or threatened monopolization of the downstream market. Disparate standards now prevail in this critical area of antitrust law. The case law and the academicians are fundamentally divided on this important issue. We respectfully urge the Court to grant certiorari, to resolve the conflict and terminate the debate.

Respectfully submitted,

MAXWELL M. BLECHER
Counsel of Record

BLECHER & COLLINS, P.C.
611 West Sixth Street
Twenty-Eighth Floor
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioners
ALASKA AIRLINES, INC.,
TRANSTAR AIRLINES CORPORATION
and NORTHWEST AIRLINES, INC.

March 26, 1992

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on March 26, 1992, I served the within *Reply Brief Of Petitioners* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and Forty Copies*)

Clerk, United States Court of Appeals
Ninth Judicial Circuit
121 Spear Street
San Francisco, California 94119-3939

Robert E. Cooper, Esq.
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071
Attorneys for Respondent, American Airlines, Inc.

Roberts B. Owen, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
Attorneys for Respondent, United Air Lines, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 1992, at Los Angeles, California.

Betty J. Malloy
(*Original Signed*)